TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 791.

MARY L. MILHEIM, FREDERICK A. METCALF, TORRENCE WHITE, SR., *ET AL.*, PLAINTIFFS IN ERROR,

vs.

THE MOFFAT TUNNEL IMPROVEMENT DISTRICT, W. P. ROBINSON, CHARLES J. WHEELER, *ET AL.*, ETC.

IN ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

FILED JANUARY 10, 1923.

(29,341)

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In the Supreme Court of the State of Colorado.

No. 10477.

MARY L. MILHEIM and FREDERICK A. METCALF, Suing on Behalf of Themselves and All Other Taxpayers and Real Estate Owners of the Moffat Tunnel Improvement District Similarly Situated and Interested, Plaintiffs in Error; The Wolfe Brothers Land Company and John Robertson Smith and Torrence White, Sr., John S. Calkins, Laura E. Mingus, and Thirty Others, on Behalf of Themselves and All Other Taxpayers and Real Estate Owners in the Moffat Tunnel Improvement District Similarly Situated and Interested, Intervening Plaintiffs and Plaintiffs in Error,

vs.

THE MOFFAT TUNNEL IMPROVEMENT DISTRICT, a Body Corporate under the Laws of the State of Colorado, and W. P. Robinson, Charles J. Wheeler, Charles MacAllister Willcox, W. N. W. Blayney, and Charles H. Leckenby, Constituting the Moffat Tunnel Commission of the State of Colorado, Defendants in Error.

Be it remembered that on the 23rd day of September, A. D. 1923, there was filed in the office of the clerk of said court an abstract of record and assignments of error in the above entitled cause, of which the following is a true copy:

No. 10477

IN THE
SUPREME COURT
OF THE
State of Colorado

MARY L. MILHELM and FREDERICK A. METCALF, Suing on behalf of themselves and all other taxpayers and real estate owners of the Moffat Tunnel Improvement District similarly situated and interested,

Plaintiffs,

THE WOLFE BROTHERS LAND COMPANY, a Corporation, and JOHN ROBERTSON SMITH,

Intervenors and Plaintiffs,

TORRENCE WHITE, SR., JOHN S. CALKINS, LAURA E. MINGUS and Thirty-three Others on behalf of themselves and all other taxpayers and real estate owners in the Moffat Tunnel Improvement District similarly situated and interested,

Intervenors and Plaintiffs,

vs.

THE MOFFAT TUNNEL IMPROVEMENT DISTRICT, a body corporate under the laws of the State of Colorado, and W. P. ROBINSON, CHARLES J. WHEELER, CHARLES MACALLISTER WILLCOX, W. N. W. BLAYNEY and CHARLES H. LECKENBY, constituting the Moffat Tunnel Commission of the State of Colorado,

Defendants.

ABSTRACT OF THE RECORD AND ASSIGNMENTS OF ERROR

CRAWSHAW-WILLIAMS PRINTING CO.

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IN THE
SUPREME COURT
OF THE
State of Colorado

MARY L. MILHELM and FREDERICK A. METCALF, Suing on behalf of themselves and all other taxpayers and real estate owners of the Moffat Tunnel Improvement District similarly situated and interested,

Plaintiffs,

THE WOLFE BROTHERS LAND COMPANY, a Corporation, and JOHN ROBERTSON SMITH,

Intervenors and Plaintiffs,

TORRENCE WHITE, SR., JOHN S. CALKINS, LAURA E. MINGUS and Thirty-three Others on behalf of themselves and all other taxpayers and real estate owners in the Moffat Tunnel Improvement District similarly situated and interested,

Intervenors and Plaintiffs,

vs.

THE MOFFAT TUNNEL IMPROVEMENT DISTRICT, a body corporate under the laws of the State of Colorado, and W. P. ROBINSON, CHARLES J. WHEELER, CHARLES MACALLISTER WILLCOX, W. N. W. BLAYNEY and CHARLES H. LECKENBY, constituting the Moffat Tunnel Commission of the State of Colorado,

Defendants.

No. 10477

ABSTRACT OF THE RECORD AND ASSIGNMENT OF ERROR

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Placita.

Complaint filed July 24th, 1922, omitting
7 therefrom the caption and verification, is in words and figures as follows, to-wit:

FOLIO

Comes now the plaintiffs above named and suing for and on behalf of themselves and on behalf of all other taxpayers and real estate owners of the Moffat Tunnel Improvement District, who are similarly situated and interested and complaining of the defendants allege:

I.

That the defendant, the Moffat Tunnel Improvement District, is a quasi municipal corporation, intended to be created by an act of the Legislature of the State of Colorado, in special session, which said Act is known as
8 the Moffat Tunnel Act, and is hereto attached and marked Exhibit A, and hereby made a part of this complaint.

That the said Act was enacted by the Twenty-third General Assembly at a special session called by the Governor in the year 1922, and said Act was signed by the Governor on the 12th day of May, 1922, since which date the said Act purports to be in full force and effect.

II.

That said Legislature in and by said Act pretended to create an improvement district consisting of the whole City and County of Denver, the County of Grand, the County of
9 Moffat, the County of Routt, and portions of Eagle, Gilpin, Boulder, Adams and Jefferson Counties as in said bill described for the purpose of constructing a transportation tunnel

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at or near what is known as James Peak, at an altitude approximating 9,200 feet, intending to construct said tunnel under the Continental Divide between the Counties of Gilpin and Grand, and in Section 6 of said Act, said tunnel is to be used as a transportation tunnel for standard guage railroads, transmission of power, telegraph and telephone lines, water and transportation of automobiles and other vehicles, and by Section 9 of said Act it is made the duty of said Commission or Board to lease the use of said tunnel to persons and corporations, public and private, for railway purposes, transmission of power, telegraph and telephone lines and the transportation of water.

III.

That the defendants above named, W. P. Robinson, Charles J. Wheeler, Charles MacAllister Willcox, W. N. W. Blayney and Charles H. Leckenby, were appointed by the Governor of the State of Colorado in pursuance of the Act referred to in the preceding Section. On to-wit the —— day of May, 1922, and immediately thereafter said members of said Commission took their oaths of office and filed their bonds as in said Act provided.

That on to-wit the 31st day of May, 1922, said Commissioners met in Denver and held an Organization Meeting, and in accordance with the said provisions in said Act provided, elected W. P. Robinson President, Charles J.

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11 Wheeler Vice President, Charles MacAllister Willcox Second Vice President, W. N. W. Blayney Treasurer and Charles H. Leckenby Secretary.

IV.

That since said Commission attempted to organize under the provisions of said Act as alleged in the second paragraph herein, it has appointed employees and agents and per-
12 formed other acts for the express purpose of carrying out the provisions of said Moffat Tunnel Bill and has taken such steps and such action as in the judgment of said Commission it deemed necessary to carry into effect the provisions of said Bill and law.

V.

Since the appointment of said Commission
13 and the qualification of said Commissioners as aforesaid, said Commissioners have by resolution determined its intention to construct the Transportation Tunnel as provided in said Act, and have by said resolution fixed the location as provided by Section 6 of the Act
14 herein referred to. Said Commission has also by resolution adopted plans and specifications for the work contemplated by the Act, and has made an estimate of the cost of the work. Said Commission has also adopted a resolution providing for the issue by said District of its negotiable interest bearing bonds in the aggregate amount of $6,720,000 for the purpose of paying for the construction of said

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Tunnel, and for paying the interest on said bonds during construction. Said Commission has also by resolution attempted to assess the benefits claimed by it to accrue by reason of the creation of said District and the construc-
15 tion of said contemplated improvements against the real estate situated in said District, and has also by said resolution declared that said real estate, claimed to be benefited, will be irrevocably pledged to the payment of bonds and interest thereon to be issued, and have also declared that in the event or events that a deficit or deficits occur in any year in the amount of money necessary to pay the interest and sinking funds on said bonds, that said Board will levy special assessments annually, if necessary, sufficient in amount to provide sufficient money each year to pay said interest on said bonds as it becomes due and to provide for the retirement of said bonds at maturity. That all of said resolutions in this Paragraph referred to are herein set forth in Exhibit B hereto attached.

VI.

That it is the intention of said Commis-
16 sion, and said Commission has so declared, to attempt to carry out the provisions of said Act, and to carry out the provisions contained in the resolutions herein referred to, and that unless restrained by an order of this Honorable Court, said Commissioners will proceed to carry out the provisions of said Act and to carry out the provisions contained in the

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resolutions herein alleged; and that said Commission will, unless restrained as aforesaid, for the purpose of paying said bonds and the interest thereon, endeavor to collect assessments against said property, and that said Commission intends to and has declared that it will levy other assessments in addition to the assessments that will be required to meet the principal and interest on said bonds, in the event that more money is required to complete said improvements than is provided for in said bond issue, but plaintiffs allege that in the performance of the acts of said Commission, as hereinbefore alleged, they have failed and neglected to comply with the provisions of said Moffat Tunnel Bill.

VII.

That the effect of the issuance of said bonds as herein alleged, and the assessment of the pretended benefits against said property of the District and the other Acts herein complained of, will create a cloud on the property of these plaintiffs and all others similarly situated within the District, and will depreciate the market value of said property and will prevent the plaintiffs and other similarly situated from selling said property at as good a price as it could be sold at were it not for the acts herein threatened.

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VIII.

That the methods of apportionment adopted by said Commissioners in attempting

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to apportion the so called pretended benefits to the real estate situated within the District and against the real estate of these plaintiffs were attempted to be made without ratio, proportion, scheme or plan, that said pretended benefits are purely guess work; were arbitra-
18 rily arrived at and have no reasonable proximation, that as a matter of fact there is no benefit accruing to any of the property of these plaintiffs or others similarly situated which could be considered a special benefit to said property, and that the only benefit, if any accruing or that might accrue after said improvements are constructed will be a general benefit to all property in the State of Colorado.

IX.

Plaintiffs further allege that the attempt on the part of said Commission to make an assessment of pretended benefits to the real estate in said District was done prematurely and was done before any possible benefits
19 could accrue to the property in said District, and allege that in no event could benefits accrue to the property by reason of said improvements until said improvements are completed.

X.

That the plan or method of apportionment attempted to be adopted by said Commission and the plan adopted by said Commission for levying assessments against the property claimed to be benefited as well as the provis-

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ions of said law pertaining to the levying of assessments against said property creates and will create unreasonable burdens against the
20 property of the plaintiffs and encumbers and creates liens against said property for an unreasonable length of time, and to that extent is taking the property of plaintiffs and all other property owners in said District without just compensation and without due process of law, that in and by the rules adopted by said Board, and in and by the law itself not only is it attempted to assess the cost of
21 said improvements against the real estate in the District, but it is also attempted to collect interest on the cost of said improvements for the full term of said bonds.

XI.

That the pretended assessments attempted by said Commission to be made by their acts and resolutions against the property of these plaintiffs and others similarly situated, is unjust, confiscatory and without any regard whatsoever to any special benefit that might possibly accrue to said property or any of it,
22 and if there is any benefit accruing to the property of these plaintiffs, or to the property of others similarly situated, the amount of the assessment against said property is far in excess of any benefits that accrue to said property by reason thereof. That the basis of apportioning and the basis of assessment of benefits is not upon distance from the improvements, not upon the front foot basis or

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upon area, or upon any other basis by which the justice or reasonableness thereof of the pretended benefits can be measured.

XII.

That the proceedings on their face with reference to the assessment of benefits and the issuing of bonds, purport to be made by the Moffat Tunnel Improvement District through said Commissioners under said Moffat Tunnel Act, and pretend to make legal
23 and valid, assessments against the real estate of these plaintiffs and others similarly situated in said District; that by said alleged assessments of benefits, liens and clouds are cast upon the property of the plaintiffs and others similarly situated and said plaintiffs and others similarly situated will be without adequate remedy in the premises; that the so called assessments are liens and claims for the amounts respectively determined, and if
24 unrestrained by this Court said assessments of benefits will be perpetual liens against the lots and lands of the respective plaintiffs and others similarly situated and said defendants will attempt to levy and collect assessments in the manner and form as set forth in their resolutions and rules and in the Act referred to, and will unless restrained by this Honorable Court cause said parcels of land to be sold for the amount of the pretended special assessments unless said assessments are paid, and that if said sales are made in the manner provided in said Act, and in the manner pro-

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vided by the resolutions of said Moffat Tunnel Commission, tax deeds will issue to purchasers at such tax sales, which by the laws
25 of the State of Colorado are made prima facie evidence of the regularity of the proceedings and doings in that behalf.

XIII.

That the said Moffat Tunnel Improvement District Law is special legislation, and as such special legislation is in violation of Section 25, Article 5 of the Constitution of the State of Colorado.

That a general law should have been passed permitting the construction of tunnels and the formation of districts at any point within the State where such tunnels are feas-
26 ible, practicable and of use or benefit to the State or portions thereof.

XIV.

That the said Act and proceedings of the Commission under the said Act are in contravention of Article 5, Section 35 of the Constitution of the State of Colorado, in that in the said Act the General Assembly has attempted to delegate to a Special Commission the power to make and supervise municipal
27 improvements, to levy taxes and to perform other municipal functions.

XV.

That the said Act and proceedings of the Commission thereunder are in violation of the

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14th Amendment of the Constitution of the United States, in that it abridges the privileges and immunities of the citizens of the United States, to-wit, the plaintiffs in this cause and all others similarly situated, deprives them of their property without due process of the law, and denies them the equal protection of the laws.

XVI.

That the said Act and the proceedings of the Commission thereunder are in violation of Sections 3, 4, 5, 6, 7 and 8, Article XI of
28 the Constitution of the State of Colorado, in that the maximum debt provided for in said Act for said District is in excess of the debt provided for in Article XI of the Constitution of the State of Colorado, and is an attempt to create a debt without submitting the question to qualified tax paying electors residing within said District.

XVII.

That the said Act and the proceedings of the Commission thereunder are in violation of Article XX of the Constitution of the State of Colorado, for the reason that the greater
29 part of said District is included within the City and County of Denver created under Article XX of the Constitution of the State of Colorado, and by said Act and proceedings of the Commission under the provisions of the Act invades the governmental powers, by

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said Article XX of the Constitution of the State of Colorado conferred exclusively upon
30 the City and County of Denver.

XVIII.

That the said Act and the proceedings of the Commission thereunder are in violation of Sections 1 and 2 of Article XI of the Constitution of the State of Colorado, in that in providing for a Transportation Tunnel at or near James Peak, the said act and the proceedings of the Commission thereunder obviously intend to lend the aid and credit of the Moffat Tunnel Improvement District to the Denver & Salt Lake Railroad and to other railroads, private corporations owning and operating railroads within said District, that the construction of the said Tunnel would be of great benefit to the said Railroads and of no benefit to any other corporation or person or to the public, directly within said District.

XIX.

That the said Act and the proceedings of
31 the Commission thereunder are in violation of Section 25, Article 2 of the Constitution of the State of Colorado, in that it is an attempt to deprive citizens of the State, to-wit, the plaintiffs and all others similarly situated, of their property without due process of the law.

XX.

That under the provisions of the said Moffat Tunnel Bill, the said Tunnel is in no sense

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a public highway and is not intended by the said Act to be a public highway for the use of the general public and plaintiffs allege that it is not the intention or purpose of said Board or Commission, nor do
32 the plans for said Tunnel now adopted by said Board, provide for a public highway or roadway for the use of teams or automobiles but is to be devoted exclusively to the use and
33 purposes of broad guage railroads and that said project and scheme is in violation of the Constitution of the State of Colorado in that it is taking the property of the plaintiffs and others similarly situated to aid a private enterprise; that the said scheme and project of the said Moffat Tunnel Bill is in violation of the Constitution of the State of Colorado in that the use to which the said Tunnel is to be devoted is not a public use, in this that it is the intent and purpose of the Bill and of the said Board or Commission, as plaintiffs are informed and verily believe, to lease the privileges of said Tunnel to private corporations in which neither the District nor the tax payers of said District are in any way interested nor will, nor can, the District or any
34 large body of such tax payers or any thereof, enjoy the use and privileges of said Tunnel, except that they pay an additional compensation to said private corporations for the privilege of its use and thus subject said District and said tax payers to double taxation for the construction thereof.

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XXI.

That it is the intent and purpose of said Board and the said Moffat Tunnel Bill so provides, to lease either part or all of the privileges of said Tunnel and thus subjecting the District and the tax payers of said Dis-
35 trict to large and exorbitant sums in payment of the project, to be used either in part or in whole as a private enterprise, in violation of the Constitution of the State of Colorado.

XXII.

That said Moffat Tunnel Bill is in violation of the Constitution of Colorado in that it permits taxation of property in the District prescribed by said Bill to construct a tunnel which is not devoted to public use, as re-
36 quired by the Constitution, and the entire scheme is beyond the power of the Legislature.

XXIII.

That said Moffat Tunnel Bill violates the Constitution of Colorado in that it proposes to tax and will tax, if said Commission is permitted to construct said tunnel and issue said bonds, all the property in the Districts described in said bill to construct a tunnel which does not in any wise or in any manner as recognized by law, benefit the tax payers of said District, in this that none of said tax payers or said District are owners or operators of Railroads nor are they owners or op-

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erators of any power plants, telegraph and
37 telephone lines, nor are any of the tax payers or residents of said District owners of any waters as appropriators or otherwise, which could be transported in said Tunnel; that it is not necessary to construct a tunnel for power lines, telegraph or telephone lines; that there are numerous power lines, telegraph and telephone lines already constructed over the Divide, in actual operation and have been so operated for many years past; that the declaration by the Legislature that the Act is necessary to secure and preserve the public health, safety, convenience and welfare and necessary for the preservation of life and property of the tax payers of said District, is
38 without foundation in fact and is based upon no fact whatever and that the declaration of said Legislature that the benefits accruing to the real estate in said District is in excess of the cost of said improvements is likewise based upon no fact or reason but on the contrary, no benefits whatever will be derived by said real estate, nor will the public health,
39 safety, convenience or welfare of the people be conserved.

XXIV.

That said act violates the due process of the law and provisions of the Constitution of Colorado, in that the time limited within which a protest may be filed, to-wit, sixty days from enactment of said law, is altogether unreasonable, unjust and impossible of compliance in that approximately 350,000 tax

FOLIO

payers reside in said District and it would be utterly impossible for a majority or any great number thereof, within a period of sixty days to protest against said Act and further that the said Moffat Tunnel violates said due process of law and provisions of the Constitution in that the time limited in said bill is unreasonable and absolutely beyond the power of
40 the majority of any large number of tax payers of said District to comply with, if they desired to file a protest because of the large number of tax payers in said District and a large portion thereof residing from fifty to one hundred miles or more from rail communication and the act of the Board which is required to sit in the City of Denver would not become known to such tax payers within the required time.

XXV.

That by reason of the methods herein set forth the plaintiffs are without any adequate legal remedy in the premises, and any remedy
41 that might be resorted to would be dilatory, incomplete and uncertain and would also require a great multitude of suits and would not afford the plaintiffs that speedy remedy guaranteed by Section 6 of Article 2 of the Constitution of the State.

XXVI.

That the said Mary L. Milheim, one of the
42 plaintiffs herein, is the owner of real estate of the value of approximately $750,000.00,

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consisting of business and residence property; That the Plaintiff, Frederick A. Metcalf, is the owner of real estate of the value of at least $100,000, consisting of real estate in Steamboat Springs and ranch property in Routt County.

WHEREFORE, the plaintiffs pray this Honorable Court that the defendants herein be enjoined from in any way proceeding with the enforcement of the Moffat Tunnel Improvement District Law, with the issuance and the sale of bonds, or with the assessment of property within the Moffat Tunnel Improvement District, and from proceeding any further under and by virtue of the pretended authority conferred upon them by the General Assembly of the State of Colorado; that all of the proceedings taken under and by virtue of the Moffat Tunnel Improvement District Law by the said Commission be declared null and void and of no force whatsoever, and for such other and further relief as this Court may deem meet and proper.

43

EDWIN H. PARK,
Attorney for Plaintiffs.

Exhibit A, attached to the foregoing complaint, the same being a copy of the Moffat Tunnel Law, enacted by the Extraordinary Session of the 23rd General Assembly of the State of Colorado and approved by the Governor of the State of Colorado on May 12th, 1922.

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Exhibit B, being attached to and made a part of the foregoing complaint, in words and figures as follows to-wit:

EXHIBIT "B"

RESOLUTION

WHEREAS, Section 6 of the Act of the General Assembly of the State of Colorado, known as the Tunnel Bill, provides among other things, that "said Tunnel is to be constructed at an elevation of approximately Nine Thousand Two Hundred (9,200) feet above sea level, the eastern portal of said tunto be located at the most practicable site on the eastern slope of the Continental Divide and near the headwaters of South Boulder Creek, the western portal of said tunnel to be located at the most practicable point on the western slope of the Continental Divide, near the headwaters of the Frazer River" and;

WHEREAS, the Commission has made an examination and investigation for the purpose of determining the most practical points for the eastern and western termini of said tunnel, as well as for determining the line or course of said tunnel, and;

WHEREAS, the Commission has referred to its Chief Engineer, and also to its Board of Advisory Engineers, the question of the location of said Tunnel, and both the Chief Engineer and said Advisory Engineers have reported to this Commission the results of their investigations and their conclusions,

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which reports are on file in the office of the Commission, and;

WHEREAS, the Commission is now fully advised in the Premises;

NOW, THEREFORE, BE IT RESOLVED, That said Tunnel be constructed at the location as follows:

That the western portal of said Tunnel shall be located at a point approximately 9,094.57 feet above sea level, and approximately at a point from which the northwest corner of Section 10, Township 2 South, Range 75 West of the 6th Principal Meridian, as established by the United States Forest Service bears North 38° 25' West 2,615 feet.

That the eastern portal of said Tunnel shall be located at a point approximately 9,198 feet above sea level, and at a point from which the West ¼ corner of Section 2, Township 2 South, Range 74 West of the 6th Principal Meridian bears North 9° and 20' West 420 feet.

That said Tunnel be constructed as nearly on a tangent as possible with sufficient grade to properly drain the same, and;

BE IT FURTHER RESOLVED, That the approaches to said Tunnel be so constructed as to accommodate the uses of the said Tunnel by railroad trains, and be so protected as to prevent caving or slides.

RESOLUTION

WHEREAS, Section 6 of the Act of the General Assembly of the State of Colorado,

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known as the Tunnel Bill, provides, among other things, that "Said Tunnel, and its approaches, shall be so constructed that the same may be used for standard gauge railroads, for the transmission of power, and for the uses of telephone and telegraph lines, for the transportation of water and for the transportation of automobiles and other vehicles" and;

WHEREAS, the Commission has investigated the nature and character of the construction to be made in order to accommodate the uses provided for in said law, and to comply with the provisions of said law, and;

WHEREAS, the Commission has referred to its Chief Engineer and also to its Board of Advisory Engineers the question of the nature and character of the construction to be made in order to accommodate the uses provided for in said law, and to comply with the provisions of said law, and the Chief Engineer and said Advisory Engineers having reported to this Commission the results of their investigations in this behalf and their conclusions thereon, which said reports are on file in the office of the Commission.

NOW, THEREFORE, BE IT RESOLVED and determined by the Commission that said Tunnel be constructed in the following manner:

By driving a main tunnel of the size re-

FOLIO

quired by said Act in the location heretofore determined by the Commission and with the eastern and western portals as heretofore determined by the Commission, with a standard cross section sixteen feet wide, neat lines, and twenty-four feet high from floor to intrados of roof arch of semi-circular form; that a Pioneer Tunnel be used from which to carry on the construction of the Main Tunnel, to be driven parallel to and at a distance of approximately 75 feet from the Main Tunnel, such pilot Tunnel to be of such character and such dimensions as to accommodate the transportation through it of water from the western slope to the eastern slope after the Main Tunnel is completed; that when said Main Tunnel is completed it be so equipped and such devices installed therein, that power lines, telephone and telegraph lines may be carried through the same.

BE IT FURTHER RESOLVED, That it is the judgment of the Commission, and it is therefore determined, that automobiles and other vehicles shall be transported through said tunnel by the use of small trolley operated flat cars, and that proper approaches be constructed at both portal entrances to provide for the easy and convenient loading of said automobiles and other vehicles.

RESOLUTION

WHEREAS, Section 10 (a) of the Moffat Tunnel Act authorizes the Board of Tunnel

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Commissioners to issue the negotiable bonds of the Moffat Tunnel District in an amount not exceeding $6,720,000 for the purpose of paying for the construction of the Moffat Tunnel, its approaches, equipment and expenses preliminary and incidental thereto, and;

WHEREAS, said Commission for the purpose of determining the amount of bonds that will be required for the purposes herein mentioned, has thoroughly investigated the costs and expenses that will be required in that behalf, and has referred to its Chief Engineer, and also to its Board of Consulting Engineers, the question of estimating all of the costs incident to the construction of said Tunnel, and said Chief Engineer, as well as said Consulting Engineers, having reported to this Commission the results of their investigations in regard to such estimates and their conclusions thereon and the Commission being fully advised in the premises;

NOW, THEREFORE, BE IT RESOLVED and it is hereby declared, that the work to be executed and the expenses incident to the construction of said Tunnel complete between the grade points of open cut approaches at each end, including railroad track laid in place on the floor of said Tunnel, drainage within the Main Tunnel, general overhead and engineering expenses and interest on the

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bonds during the period of construction is	$5,879,500
That the estimated cost of electrical equipment for operation is	358,500
That the estimated cost for contingencies arising in construction during progress of work is	400,000
Total estimated cost	$6,720,000

RESOLUTION

WHEREAS, the Twenty-third General Assembly of the State of Colorado, in extraordinary session convened on the 18th day of April, A. D. 1922, by an Act approved the 12th day of May, A. D. 1922, created the Moffat Tunnel Improvement District, to be managed and controlled by the Moffat Tunnel Commission, and authorized and directed said Commission to construct in and for said district a transportation tunnel through the Continental Divide, at or near James Peak, together with the equipment of said tunnel and the approaches thereto; and

WHEREAS, the Commission has, in full conformity with law, resolved to construct said tunnel, to be known as the Moffat Tunnel; and

WHEREAS, the Commission, in conformity with law and a resolution adopted the 21st day of July A. D. 1922, appraised the benefits to the several parcels of real estate within the Moffat Tunnel Improvement District

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which will result from the organization of said district and the construction of said tunnel, its approaches and equipment; and,

WHEREAS, under the provisions of said Act creating the Moffat Tunnel Improvement District, the Moffat Tunnel Commission is authorized to issue the negotiable coupon bonds of the district in an amount not exceeding $6,720,000; and,

WHEREAS, the Commission has determined and does hereby determine to issue the negotiable bonds of the Moffat Tunnel Improvement District in the aggregate amount of $6,720,000.

NOW, THEREFORE, BE IT RESOLVED by the Moffat Tunnel Commission:

1. That the Moffat Tunnel Improvement District shall issue its negotiable coupon bonds, to be known as Moffat Tunnel Bonds, in the aggregate amount of $6,720,000, such bonds to be of such date, of such denominations, to bear such rate of interest and be in such form as the Commission may hereafter determine and prescribe; the said bonds, principal and interest, to be paid as follows: If the revenues from the use of said Tunnel, its approaches and equipment are not sufficient to pay the interest in any year as it becomes due on said bonds, and to provide for the retirement of said bonds at maturity and for the purpose of paying the expenses of the Moffat Tunnel Commission and the mainte-

nance of said tunnel, its approaches and equipment, then and in order to prevent the occurrence of a deficit the Moffat Tunnel Commission will, in the manner provided in said Act, levy special assessments annually, if necessary, upon all real estate within the District (except such real estate as is by law exempted) and against the appraised benefits accruing to such real estate by reason of the organization of said district and the construction of said tunnel, its approaches and equipment, but not in excess thereof, to provide sufficient money to pay the interest on said bonds as it becomes due and to provide for the retirement of said bonds at maturity.

THE MOFFAT TUNNEL COMMISSION
RESOLUTION

PROVIDING FOR THE APPRAISAL OF BENEFITS TO THE SEVERAL PARCELS OF REAL ESTATE WITHIN THE MOFFAT TUNNEL IMPROVEMENT DISTRICT WHICH WILL RESULT FROM THE ORGANIZATION OF SAID DISTRICT AND THE CONSTRUCTION OF A TRANSPORTATION TUNNEL THEREIN, ITS APPROACHES AND EQUIPMENT, AS AUTHORIZED AND DIRECTED BY THE ACT PROVIDING FOR THE CREATION OF THE MOFFAT TUNNEL IMPROVEMENT DISTRICT.

WHEREAS, the Twenty-third General Assembly of the State of Colorado, in extraordinary session convened on the 18th day of April, A. D. 1922, by an Act approved the

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12th day of May, A. D. 1922, created the Moffat Tunnel Improvement District, to be managed and controlled by the Moffat Tunnel Commission, and authorized and directed said Commission to construct in and for said district a transportation tunnel through the Continental Divide, at or near James Peak, together with the equipment of said tunnel and the approaches thereto; and

WHEREAS, the Commission has, in full conformity with law, resolved to construct said tunnel, to be known as the Moffat Tunnel, at a location described as follows, to-wit:

> That the western portal of said Tunnel shall be located at a point approximately 9094.57 feet above sea level, and approximately at a point from which the Northwest corner of Section 10, Township 2 South, Range 75 West of the 6th Principal Meridian, as established by the United States Forest Service bears North 38 degrees 25 minutes West 2615 feet.
>
> That the Eastern portal of said Tunnel shall be located at a point approximately 9,198 feet above sea level, and at a point from which the West quarter corner of Section 2, Township 2 South, Range 74 West of the 6th Principal Meridian bears North 90 degrees and 20 minutes West 420 feet; and

WHEREAS, the Commission has, in full conformity with law, adopted (subject to modification) plans and specifications for the

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work contemplated by the Act creating the Moffat Tunnel Improvement District, together with estimates of the cost and expense involved in the creation of said District and the construction of said transportation tunnel, its equipment and approaches, such estimate (subject to modification) being as follows, to-wit:

The work to be executed and estimated cost incident to the construction of said Tunnel complete between the grade points of open cut approaches at each end, including railroad track laid in place on the floor of said Tunnel, drainage within the Main Tunnel, general overhead and engineering expenses and interest on the bonds during the period of construction is ----------$5,879,500

Estimated cost of electrical equipment for operation is---------- 358,500

Estimated cost for contingencies arising in construction during progress of work is---------- 400,000

Total estimated cost-------$6,720,000

WHEREAS, it has been determined and it is hereby declared by the Commission that by reason of the construction of said tunnel, its equipment and approaches, as contemplating by the Act creating the Moffat Tunnel Improvement District, the real estate (exclusive of property exempt by law from assessment) within said district will be spe-

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cially benefited in the manner and to the extent in this resolution set forth; and

WHEREAS, it has been determined and it is hereby declared by the Commission that although it is contemplated by the Act creating the Moffat Tunnel Improvement District that by means of rental contracts, an income will ultimately be derived from the use of said tunnel and its appurtenances sufficient in amount to maintain said utility and provide for the payment, both principal and interest, of the indebtedness which may be incurred in the construction thereof, as may be evidenced by the Moffat Tunnel bonds authorized by said Act, nevertheless, as authorized by said Act, adequate provision must be made to secure the payment of such indebtedness by the appraisal of benefits to the several parcels of real estate within the district which will result from the organization of said district and the construction of said tunnel, its approaches and equipment and by the levy of special assessments against such appraised benefits in the event that the income derived from the use of said tunnel shall be insufficient to provide for the payment of such indebtedness; and

WHEREAS, it has been determined and it is hereby declared by the Commission that an appraisal of the benefits to the several parcels of real estate within said district which will result from the organization of said district and the construction of said tun-

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nel, its approaches and equipment, in accordance with the plans, specifications and estimates of cost adopted (subject to modification) by the Moffat Tunnel Commission and as contemplated by the Act creating said district, is now advisable and necessary for the accomplishment of the objects contemplated by said Act; and

WHEREAS the Commission has made a careful investigation and examination of the real estate in said district and of the benefits accruing to said real estate by reason of the organization of said district and the construction of said tunnel, its approaches and equipment; and

WHEREAS, in order to aid the Commission in arriving at a determination and decision as to the fairest and most equitable basis for making such appraisal and in determining the benefits accruing to each parcel of real estate to be assessed, a large number of witnesses familiar with the real estate in said district and familiar with the benefits which will accrue by reason of the creation of said district and the construction of said improvements therein, have testified before the Commission with respect to the matters to be fixed and determined by the Commission; and

WHEREAS, the Commission, by reason of the matters and things hereinbefore recited, is now fully advised in the premises.

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NOW, THEREFORE, BE IT RESOLVED by the Moffat Tunnel Commission:

1. That the aggregate full cash value of the real estate within said district subject to assessment under the Moffat Tunnel Act is hereby found and declared to be $298,544,996, exclusive of real estate that may have been omitted from appraisal hereunder.

2. That the Commission hereby determines and declares that the present full cash value of real estate within the district upon the assessment rolls in the offices of the County Treasurers of the respective Counties, which is specially benefited by the proposed improvements therein and subject to appraisal and assessment by reason of such benefits is $264,832,877; that this appraisal of the values of real estate within the district is based upon the assessed valuation of such real estate as assessed and equalized by the taxing officers of the state of Colorado in the year 1921, for purposes of general taxation for state and county purposes and does not include improvements which have been made and not assessed since 1921 to the date of this resolution and which may hereafter be appraised in such manner and at such time as the Commission may, in conformity with law and the resolutions and rules adopted by the Board in relation thereto fix and determine.

3. That the Moffat Tunnel Commission has determined, and does hereby determine and declare that Public Utilities, as defined

by Section 41 of Chapter 216 of the Session Laws of Colorado, 1911, being an Act to create a permanent Tax Commission, as amended by Chapter 133 of the Session Laws of Colorado, 1913, own real estate within said Moffat Tunnel Improvement District, and have determined and declared, and do hereby determine and declare that the aggregate full cash value of said real estate is $21,615,789, that said Commission has also determined the valuation of each parcel of said real estate and has made a record showing the description of each parcel, the valuation and the name of the owner thereof.

4. That the Moffat Tunnel Commission has determined and does hereby determine and declare, that the full cash value of real estate subject to assessment, the benefit to which has been determined by the Commission prior to the date of this Resolution and not included in the foregoing classifications in Section 2 and Section 3 of this Resolution is $12,096,330; that the Moffat Tunnel Commission has determined the full cash value of each parcel of said real estate and has made a record of the same showing the description of each parcel, the valuation and the name of the owner thereof.

5. That the benefits to the several parcels of real estate within the said district, which will result from the organization of said district and the construction of said tunnel, its approaches and equipment, are hereby appraised as follows: It is hereby determined

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and declared that the full cash value of each parcel of real estate within said District will, by reason of the organization of said District and the construction of said Tunnel, and its approaches and equipment, be increased in value at least to the extent of 15 per cent of its present full cash value; wherefore the benefits to the several parcels of real estate within said district, are hereby appraised at 15 per cent of the present full cash value thereof.

6. That all benefits accruing to real estate in said District which may for any reason have been omitted from assessment hereunder, may hereafter be appraised at such time and in such manner as the Commission may, in conformity with law and the resolutions and rules adopted by the Board in relation thereto fix and determine.

7. That the secretary of this Commission, shall in addition to the published notice hereinafter provided for, mail a copy of such notice to each Public Utility as defined by Section 41 of Chapter 216 of the Session Laws of Colorado, 1911, being an Act to create a permanent Tax Commission, as amended by Chapter 133 of the Session Laws of Colorado, 1913, owning real estate in said Moffat Tunnel Improvement District.

8. That after the hearings hereinafter provided for and after making all proper corrections, the Commission shall confirm the appraisal of benefits and, upon such confirmation, the appraisal of benefits so confirmed

shall be final and conclusively binding upon all real estate in the district and upon the owners thereof.

9. That upon the completion of said hearings and the confirmation of the benefits appraised, the Secretary of the Commission shall prepare and preserve in the office of the Commission a permanent record which shall contain (a) the description of the several parcels of real estate upon which benefits have been appraised; (b) the full cash value thereof; and (c) the amount of benefits appraised.

10. That the secretary of the Commission be and he is hereby directed to give notice of the appraisal of benefits made or to be made in conformity with the provisions of this resolution, by publication in each county in the District. Such notice shall be given by publication in two issues, a week apart, in some newspaper of general circulation published in each county. Such notice shall be in form substantially as follows:

> Public Notice to the Owners of Real Estate in the Moffat Tunnel Improvement District and to Whom It May Concern:

In conformity with law and a resolution adopted July 22, 1922, public notice is hereby given to whom it may concern and specially to the owners of real estate situate within the boundaries of the Moffat Tunnel Improvement District as created by "An Act to provide for the creation of an improvement Dis-

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trict to be called the Moffat Tunnel Improvement District," approved May 12, 1922, as such real estate is set forth and described in and upon the tax rolls in the offices of the respective Treasurers of the Counties in which such real estate is located, as certified in the year 1921 to such County Treasurers for the collection of general State and County taxes for that year, and as such real estate owned by Public Utilities as defined by Section 41, Chapter 216 of Session Laws of Colorado for 1911, and as amended by Chapter 133 of Session Laws of Colorado 1913, and as all other real estate not included in the foregoing classifications is set forth and described in the office and upon public records of the Moffat Tunnel Commission.

(1) That on, to-wit, the 21st day of July, A. D. 1922, the Moffat Tunnel Commission adopted a certain resolution in part as follows:

"WHEREAS, the Twenty-third General Assembly of the State of Colorado, in extraordinary session convened on the 18th day of April, A. D. 1922, by an Act approved the 12th day of May, A. D. 1922, created the Moffat Tunnel Improvement District, to be managed and controlled by the Moffat Tunnel Commission, and authorized and directed said Commission to construct in and for said District a transportation tunnel through the Continental Divide, at or near James Peak, together with the equipment of said tunnel and the approaches thereto; and,

"WHEREAS, the Commission has, in full conformity with law, resolved to construct said tunnel, to be known as the Moffat Tunnel, at a location described as follows, to-wit:

"That the western portal of said tunnel shall be located at a point approximately 9,094.57 feet above sea level and approximately at a point from which the Northwest corner of Section 10, Township 2 South, Range 75 West of the 6th Principal Meridian, as established by the United States Forest Service bears North 38° 25' West 2,615 feet.

"That the eastern portal of said Tunnel shall be located at a point approximately 9,198 feet above sea level, and at a point from which the West ¼ corner of Section 2, Township 2 South, Range 74 West of the 6th Principal Meridian bears North 90° and 20' West 420 feet.

"WHEREAS, the Commission has, in full conformity with law, adopted (subject to modification) plans and specifications for the work contemplated by the Act creating the Moffat Tunnel Improvement District, together with estimates of the cost and expense involved in the creation of said District and the construction of said transportation tunnel, its equipment and approaches, such estimate (subject to modification) being as follows, to-wit:

"NOW, THEREFORE, BE IT RESOLVED, and it is hereby declared that the work to be executed and estimate cost incident to the construction of said Tunnel com-

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plete between the grade points of open cut approaches at each end, including railroad track laid in place on the floor of said Tunnel, drainage within the main Tunnel, general overhead and engineering expenses and interest on the bonds during the period of construction is ----------$5,879,500

Estimated cost of electrical equipment for operation is-------- 358,500

Estimated cost for contingencies arising in construction during progress of work is---------- 400,000

Total estimated cost------$6,720,000"

(2) That on, to-wit, the 22nd of July, A. D. 1922, the Moffat Tunnel Commission adopted a certain resolution in part as follows:

"WHEREAS, It has been determined and it is hereby declared by the Commission that by reason of the construction of said tunnel, its equipment and approaches, as contemplated by the Act creating the Moffat Tunnel Improvement District, the real estate (exclusive of property exempt by law from assessment) within said district will be specially benefited in the manner and to the extent in this resolution set forth; and,

"WHEREAS, It has been determined and it is hereby declared by the Commission that although it is contemplated by the Act creating the Moffat Tunnel Improvement District that by means of rental contracts, an income will ultimately be derived from the

use of said tunnel and its appurtenances sufficient in amount to maintain said utility and provide for the payment, both principal and interest, of the indebtedness which may be incurred in the construction thereof, as may be evidenced by the Moffat Tunnel bonds authorized by said Act, nevertheless, as authorized by said Act, adequate provision must be made to secure the payment of such indebtedness by the appraisal of benefits to the several parcels of real estate within the said district which will result from the organization of said district and the construction of said tunnel, its approaches and equipment, and by the levy of special assessments against such appraised benefits in the event that the income derived from the use of said tunnel shall be insufficient to provide for the payment of such indebtedness; and,

"WHEREAS, It has been determined and it is hereby declared by the Commission that an appraisal of the benefits to the several parcels of real estate within said district which will result from the organization of said district and the construction of said tunnel, its approaches and equipment, in accordance with the plans, specifications and estimates of cost adopted (subject to modifications) by the Moffat Tunnel Commission and as contemplated by the Act creating said district, is now advisable and necessary for the accomplishment of the objects contemplated by said Act; and,

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"WHEREAS, The Commission has made a careful investigation and examination of the real estate in said district and of the benefits accruing to said real estate by reason of the organization of said district and the construction of said Tunnel, its approaches and equipment; and,

"WHEREAS, in order to aid the Commission in arriving at a determination and decision as to the fairest and most equitable basis for making such appraisal and in determining the benefits accruing to each parcel of real estate to be assessed, a large number of witnesses familiar with the real estate in said district and familiar with the benefits which will accrue by reason of the creation of said district and the construction of said improvements therein, have testified before the Commission with respect to the matters to be fixed and determined by the Commission; and,

"WHEREAS, The Commission, by reason of the matters and things hereinbefore recited, is now fully advised in the premises;

"NOW, THEREFORE, BE IT RESOLVED by the Moffat Tunnel Commission:

"1. That the aggregate full cash value of the real estate within said district subject to assessment under the Moffat Tunnel Act is hereby found and declared to be $298,544,996, exclusive of real estate that may have been omitted from appraisal hereunder.

"2. That the Commission hereby determines and declares that the present full cash

value of real estate within the district upon assessment rolls in the offices of the County Treasurers of the respective counties, which is specially benefited by the proposed improvements therein and subject to appraisal and assessment by reason of such benefits is $264,832,877; that this appraisal of the values of real estate within the district is based upon the assessed valuation of such real estate assessed and equalized by the taxing officers of the State of Colorado in the year 1921, for purposes of general taxation for State and County purposes and does not include improvements which have been made and not assessed since 1921 to the date of this resolution and which may hereafter be appraised in such manner and at such time as the Commission may, in conformity with law and the resolutions and rules adopted by the Board in relation thereto, fix and determine.

"3. That the Moffat Tunnel Commission has determined, and does hereby determine and declare that Public Utilities, as defined by Section 41 of Chapter 216 of the Session Laws of Colorado, 1911, being an Act to create a permanent Tax Commission, as amended by Chapter 133 of the Session Laws of Colorado, 1913, own real estate within said Moffat Tunnel Improvement District, and have determined and declared that the aggregate full cash value of said real estate is $21,615,789, that said Commission has also determined the valuation of each parcel of said real estate and has made a record showing the descrip-

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tion of each parcel, the valuation and the name of the owner thereof.

"4. That the Moffat Tunnel Commission has determined and does hereby determine and declare, that the full cash value of real estate subject to assessment, the benefit to which has been determined by the Commission prior to the date of this resolution and not included in the foregoing classifications in Section 2 and Section 3 of this Resolution is $12,096,330; that the Moffat Tunnel Commission has determined the full cash value of each parcel of said real estate and has made a record of the same showing the description of each parcel, the valuation and the name of the owner thereof.

"5. That the benefits to the several parcels of real estate within said district, which will result from the organization of said district and the construction of said tunnel, its approaches and equipment are hereby appraised as follows: It is hereby determined and declared that the full cash value of each parcel of real estate within said district will, by reason of the organization of said district and the construction of said Tunnel, its approaches and equipment, be increased in value at least to the extent of 15 per cent of its present full cash value; wherefore the benefits to the several parcels of real estate within said District are hereby appraised at 15 per cent of the present full cash value thereof."

(3) That any property owner may accept the appraisal of benefits made by the Moffat Tunnel Commission, and shall be construed to have done so unless he shall, within ten days after the date of this notice file his written exceptions, or objections to the appraisal of benefits made by the Commission.

(4) That all exceptions or objections to the appraisal of benefits made by the Commission must be filed in the office of the Commission in the State Capitol, in the City and County of Denver, State of Colorado, on or before the 23rd day of August, A. D. 1922.

(5) That all exceptions or objections to the appraisal of benefits will be heard and determined by the Moffat Tunnel Commission at the office of the Commission in the State Capitol, in Denver, Colorado, commencing on the 25th day of August, 1922, at the hour of 10 o'clock A. M. on said day, and continuing during business hours of each day thereafter until all such exceptions have been disposed of.

(6) That at such hearings the Commission will hear such evidence and argument as may be offered concerning the correctness of such appraisals of benefits and, if found to be incorrect or inequitable will modify or amend the same.

(7) That after the completion of such hearings and after making all proper corrections, the Commission will confirm the appraisal of benefits and, upon such confirma-

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tion, the appraisal of benefits shall be final and conclusively binding upon all real estate in the district and the owners thereof.

(8) That all benefits accruing to real estate in said District which may for any reason have been omitted from appraisal hereunder, may hereafter be appraised at such time and in such manner as the Commission may, in conformity with law, and the Resolutions and Rules adopted by the Board in relation thereto, fix and determine

(9) That to pay for the construction of said Tunnel, its approaches, equipment and expenses preliminary and incidental thereto and to pay interest on bonds issued as provided in said Act during the period of construction, the Moffat Tunnel Commission will, in the manner provided by said Act, issue the negotiable coupon bonds of the District in an amount not exceeding Six Million Seven Hundred Twenty Thousand Dollars ($6,720,000) to bear interest at a rate not exceeding 6 per centum per annum, payable semi-annually; and if the revenues from the use of said Tunnel, its approaches and equipment are not sufficient to pay the interest in any year as it becomes due on said bonds, and to provide for the retirement of said bonds at maturity and for the purpose of paying the expenses of the Moffat Tunnel Commission and the maintenance of said Tunnel, its approaches and equipment, then and in order to prevent the occurrence of a deficit the Moffat Tunnel Commission will, in the manner provided by

said Act, levy special assessments annually, if necessary, upon all real estate within the District (except such real estate as is by law exempted) and against the appraised benefits accruing to such real estate by reason of the organization of said District and the construction of said Tunnel, its approaches and equipment, but not in excess thereof, to provide sufficient money to pay the interest on said bonds, as it becomes due and to provide for the retirement of said bonds at maturity.

Dated Denver, Colorado_____1922.

The Moffat Tunnel Commission,

By_____

Secretary.

First Publication_____, 1922.

Second Publication _____, 1922

Adopted this____day of_____, A. D. 1922.

The intervening petition of the intervening plaintiffs, The Wolfe Brothers Land Company, et al., filed on the second day of August, 1922, omitting the caption and verification, is in words and figures as follows, to-wit:

45

Now comes The Wolfe Brothers Land Company, a Corporation, and John Robertson Smith, and file this their petition in intervention in this cause and allege:

1. That The Wolfe Brothers Land Company is a Corporation organized and existing under the laws of the State of Colorado, and the owner of real estate in Township

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three (3) South, Range sixty-eight (68) West of the 6th P. M. Adams County, Colorado.

2. That John Robertson Smith is a resident and citizen of the City and County of Denver, and the owner of real estate in Township three (3) South, Range sixty-eight (68)
52 West of the 6th P. M. Adams County, State of Colorado, and in the City and County of Denver.

3. That by the complaint filed by the original plaintiffs herein, it appears that this suit is brought on behalf of said plaintiffs and also on behalf of all other tax payers and real estate owners of the Moffat Tunnel Improvement District, similarly situated and interested, and these intervening plaintiffs allege that they are taxpayers and owners of real estate in said district and similarly situated and interested with the original plaintiffs herein, and that they desire hereby to avail themselves of the bringing and pendency of the said suit and to be admitted by the order
53 of this Court as additional and intervening plaintiffs herein.

4. These intervenors do hereby expressly adopt, accept and confirm the complaint, exhibits, and each and all of the averrments of the complaint filed herein by the original plaintiffs, to stand as a part of the allegations of this petition and complaint, and as stating in part the cause of action of these intervening plaintiffs.

5. These intervening plaintiffs, without prejudice to any of the averrments of the

original complaint, and in addition and supplementary thereto, do hereby further set forth matters and things justifying and requiring the granting of the relief demanded in the original complaint and in this petition, and in doing so bring to the attention of the Court and allege that by the Act described in the original complaint and set out therein,
55 and known as the Moffat Tunnel Bill, and hereinafter for the sake of brevity referred to by that name, and especially in and by Section 1 of the said Act, it is declared that the purpose and object of said Bill is to remove the barrier which now separates the Western portions of this State from commercial intercourse with the Eastern portion thereof, and to facilitate communication at all seasons of the year, and to promote the health, comfort, safety, convenience and welfare of the people of the State of Colorado, meaning thereby, all the people of all of the state of Colorado, and these plaintiffs state that such was and is the object and purpose of the bill, and that if any benefits at all arise from the construction of the tunnel, such con-
56 struction will, in varying degree, be for the benefit of all the people of all the state of Colorado, and not for the special benefit to the property within the boundaries of the Improvement District attempted to be created by said Moffat Tunnel Bill.

6. That the Moffat Tunnel Bill is unconstitutional and void, both under the constitution of the United States of America, and

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under the constitution of the State of Colorado, not only for the reasons stated in the original complaint, but also and more particu-
57 larly because there is no power or authority vested in the Legislature of the State of Colorado, to create a single improvement district out of a part only of the area of the state, or to make any laws, special in their nature, and affecting and controlling only such isolated portion of the area of the state, and that said law is in direct conflict with Section 25 of Article V of the Constitution of Colorado, forbidding the General Assembly to pass local or special laws in any of the cases enumerated therein, with special reference to the
58 provisions of said section forbidding "any local or special law relating to the opening or conducting of any election, or designating the place of voting, and also in violation of the provision of said section that in all other cases where general law can be made applicable, no special law shall be enacted."

7. These intervening plaintiffs allege that the provisions of Section 3 of said Act allowing written remonstrance against the making of all improvements proposed in said Bill to be filed within sixty (60) days from the time the said act went into effect and requiring, to give effect to such remonstrance, that at least fifty per cent (50%) of the value of the property provided to be assessed, shall
59 join in such remonstrance by subscription thereof and acknowledgment by each of the signers, is a deliberate and willful fraud upon

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the land owners of said District, and is so framed as to intentionally provide that no such remonstrance can or will be made, and that the size of the District, the great number of tax payers as pointed out in the original complaint herein, absolutely prevent the joinder of, or action by, any large number of the taxpayers and land owners of said District within the short period allowed by said bill, and that if the action allowed to be taken by the Board in default of such remonstrance be of any force or effect whatever as against the lands of the land owners in said district,
60 such action is not due process of law and is in violation of both the constitution of the state and of the United States.

8. All of the provisions of Section 4 of said Act, and each and every paragraph and word thereof, is in conflict with and forbidden by the provision of the Constitution of
61 the State of Colorado, forbidding special legislation, and forbidding laws providing for or regulating an election other than by a general law.

8. There is no time limit created or stated in said bill when said so-called Improvement District shall cease to be responsible. On the contrary, the said Improvement District, under the terms of said law, will exist forever and whether said tunnel shall be completed or not, the Board managing the same will continue as an existing body with power of taxation of said lands for all time to come, and that the powers purported to be granted by

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said bill of taxation are wholly beyond, and in excess of, and outside of any of the rights
62 or duties or liabilities proper to be exercised or created in connection with improvement districts so-called.

That the said Board, under the assumed authority of said bill, has already by resolution declared as a basis for assessmnet upon said lands, and as a potential assessment upon said lands, an alleged benefit and right of ultimate assessment to the amount of more than $46,000,000 and that under said law, by reason of the long continuing and perpetual right to levy assessments, attempted to be given to said Board by said Bill, the entire sum of said alleged benefit and the potential assessment in excess of $46,000,000 may in the future, be actually levied and assessed against the lands of said District for the reason that the maintenance of said tunnel in any future year in which the deficit of rentals
63 and income occurs, is made specifically the duty of said District, and authority is given, or purports to be given, to said Board, to continue any levy for all time to come, and in every year, assessments against the lands of the said District.

The completion of said tunnel and of all
64 the accessories and additions by way of power plants, approaches and the equipment, completion, rental and full use thereof, which may be added under said Bill by said Board, and full payment for all thereof, in no manner, or to any extent, releases the lands of

the District from further levies and assessments, or limits the powers of said Board to make further assessments.

9. There is in said Bill practically no restriction upon the powers of the Board to continue from time to time to levy assessments on the lands of said District, even in excess of the present potential declaration of benefit and basis of assessment in excess of $48,000,000. The amount of bonds authorized to be issued, $6,720,000 is not made, or attempted to be made, any measure of the cost of the tunnel. The Board may sell, spend and
65 dispose of all of said bonds, or the proceeds thereof, and then under said Bill, and especially under the provisions of Section 8 thereof, continue to be vested with all powers necessary and requisite for the accomplishment of the purposes for which the District is stated to be organized and included therein, if valid at all, the continuing power to levy upon the lands of the District for all such sums of money as may be necessary and required in excess of the proceeds of said bonds for the completion of said tunnel and the appurtenances and equipment necessary for the use thereof.

10. It is provided by said Bill that the
66 tunnel, its approaches, equipment and appurtenances, shall be owned perpetually by the Moffat Tunnel Improvement District, and shall remain forever a public improvement for public transportation and communication, and that after the bonds, which may be issued

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under the provisions of this Act, are fully paid, it shall then be maintained and operated as provided by law.

By Section 9 of said Act, however, it is
67 provided that the rentals, payable by persons or corporations, shall be apportioned as nearly as possible, according to the respective values of the different uses thereof, and that no contracts shall be made unless the lessee is bound to pay as rental therefor, an amount determined by the Board and specifically in the contract, which shall be a fair and just proportion of the total amount required to pay interest on the bonds, plus a just proportion of the amount necessary for their retirement, and plus the cost of maintenance of the tunnel, its approaches and equipment, and these contracts are authorized to be made for a period not longer than 99 years. Such contracts may be assigned or sub-leased, and then follows a provision as follows:

> "Subsequent leasing of contracts for the same use must provide for the reimbursement to the prior users of an
> 68 equitable proportionate amount theretofore paid for the retirement of bonds, including interest thereon."

These plaintiffs allege that there is no justification whatever for the reimbursement to the first, or any, lessees of said tunnel of any payments of rent at any time made by such lessees, and applied to the retirement of the bonds and that all subsequent rents, if any,

arising after the payment of the bonds of the District, if issued, should and would be the property of the District and of the land owners and that the attempt to reimburse the railroads from subsequent rents for the amount of rents paid by them, or any of them, and applied for the retirement of the bonds, is in direct violation of the constitution of the
69 State of Colorado, forbidding under Sections 1 and 2 of Article II of said Constitution, the lending or pledging of the credit or faith of the state, directly or indirectly, in any manner, to or in aid of, any private company, or corporation, public or private, for any amount, or for any purpose whatever, and also forbidding the state, or any county, city, town, township or school district, to make any donation or grant to or in aid of, or be-
70 come a subscriber to, or shareholder in, any corporation or company, or a joint party with any person, company or corporation, public or private, in or out of the state.

11. Said Section 9 and also Section 15 of the said Bill attempt to give to the Board judicial powers, final in their nature, and as to some of the matters expressly made final, and that the attempted granting of such judicial powers to the Board, final in their nature, is in violation of the Constitution of Colorado under Article 3 thereof, and under Section 1 of Article 6 thereof.

12. By Section 11 of said Bill, it is de-
71 clared that the special benefits accruing to the lands of said District are in excess of the

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cost of the improvements herein provided for, and in excess of the assessments herein provided for against said real setate. These plaintiffs deny the truth of the said statement, both under the facts existing and also under the provisions of the bill itself because the amount of the assessments provided for in said bill bear no relation whatever to the cost of the improvements, future assessments
71 indefinitely for maintenance being expressly authorized.

13. The said Moffat Tunnel Bill, in respect to special assessments to be made to lands against the District, is so uncertain and indefinite as to be held wholly unenforceable or so obviously beyond the purpose of an improvement district that it ought not to be enforced, and that by Section 11 special assessments are to be made in proportion to the benefits to each piece of real estate accruing by reason of the improvements provided to be
73 made, while on the contrary, in Section 13 of said Act it is expressly made the duty of the Board to levy special assessments annually to prevent the occurrence of a deficit arising, among other things, by reason of the maintenance of the tunnel, its approaches and equipment.

14. The provisions of Section 15 of said Act, with reference to the hearing of objections to assessment, and the notices to be given by the Board, and the rights of taxpayers at such hearings, are so grossly inadequate for the protection of land owners as

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to amount, if action be taken thereon, and the perpetual lien of the assessments authorized to be made thereunder is enforced as against lands in the District, that the lands and properties of taxpayers will be taken without due process of law, in direct violation, both of the constitution of the state of Colorado and the constitution of the United States. At those hearings, the Board is authorized to hear evidence and argument concerning both the correctness and the legality of the proposed assessments after objections are made, the effect thereof being to attempt to vest in the Board judicial powers not only as to the amount of the assessments, but as to the force and effect as a matter of law, of the Bill itself, and then further on, although an appeal is allowed and may be taken to the District Court, the only ground upon which
75 the Court can disturb the findings is the manifest disproportion in the assessments complained of, with those imposed upon other property in the District. The Bill attempts to expressly take away from the District Court the power to pass upon the legality of the assessments.

15. The Bill nowhere declares the extent of the liability of any given piece of land within the District. The question of whether or not, under the issuance of bonds as herein proposed to be authorized, there is a blanket
76 liability upon each piece of land, continuing until all of the indebtedness is paid, or whether such liability is limited to, and measured

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by, the benefits lawfully ascertained as arising to that particular piece of land, is in no manner dealt with or provided for.

18. Section 18 of the Bill limits the right of a property owner to discharge his assessment only to using coupons of the bonds, and does not allow the use of the bonds themselves, if owned by the tax payers, and where levies are made for the purpose of paying the bonds, it should be provided that the bonds
77 themselves may be used to pay such assessments.

WHEREFORE, these plaintiffs pray that they be joined as plaintiffs intervening in this cause, and that they may have all the relief prayed for in the original complaint, and all such other and further relief as they may show themselves to be entitled to.

THE WOLFE BROTHERS LAND COMPANY,
JOHN ROBERTSON SMITH,
By John R. Smith, Their Attorney,
Intervenors and Plaintiffs.

The answer of the Defendants, filed the
81 8th day of August, 1922, to the complaint, omitting the caption and verification, is in words and figures as follows, to-wit:

Come now the above named defendants by
83 their attorneys, Norton Montgomery and Erskine Myer, and answering the complaint herein, allege:

I.

That said complaint does not state facts sufficient to constitute a cause of action against the defendants above named or any or either of them.

II.

Defendants deny each and every allegation contained in said complaint, except those
84 allegations herein specifically admitted or denied.

III.

Defendants admit Paragraphs 1, 2, 3, 4 and 5 of the complaint.

85 In answer to Paragraph 6 of said complaint, defendants admit that it is their intention and that they have so declared to carry out the provisions of the Moffat Tunnel Act, and allege that they have commenced and are now carrying out the provisions of said Act; and further admit that it is their intention to carry out the provisions contained in the resolutions referred to in said complaint; and further admit that it is their intention and determination to collect assessments against the real estate within the district, in the event that the revenues received for the use of said Tunnel, its approaches and equipment, are not sufficient to pay the bonds and the interest thereon. Defendants further
86 admit that it is their intention and so declare that said Board will levy other assessments in addition to the assessments required for paying the bonds and interest thereon in the

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event that it is necessary to fully carry out the duties imposed upon them by the Moffat Tunnel Act; but defendants further allege that they are reliably informed, and believe that the sum of $6,720,000 is ample to construct and provide the improvements provided for in said Act; and further allege that it is their belief that no assessments will be required other than the assessments which may be required to pay the principal and interest of said bonds; and defendants further allege that they are informed and believe that
87 the monies derived from the use of said Tunnel, after the same is completed, will be sufficient to meet the principal and interest of said bonds and to pay the expenses necessarily incident to the expenses of said Tunnel, and that, therefore, upon such information and belief they allege that no assessments will be required against the real estate in said District.

88 Defendants deny that they have in any manner neglected to comply with the provisions of said Moffat Tunnel Bill.

V.

In answer to Paragraph 7 of said complaint, defendants deny that the issuance of said bonds, or the assessment of benefits against the property of the District or any other Acts which they have done or performed will create a cloud on the property of the plaintiffs, or of others owning or interested in real estate in said District, and deny

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that the issuance of said bonds, or the assessment of benefits, or any other acts of theirs will depreciate the market value of said property, or that it will prevent the plaintiffs or others from selling said property at as good a price as it could be sold at otherwise; but on the contrary allege that the property of the
89 plaintiffs situated within the District, as well as all other property the benefits of which have been assessed, has been greatly increased in value by reason of the organization of said District, and has been increased in value much in excess of the benefits assessed.

VI.

Defendants deny each and every allegation contained in Paragraph 8 of said complaint, and on the contrary allege that the proportion of benefits adopted by the Board was adopted after a full and careful investigation of the best basis of apportionment to adopt, that many witnesses were called before the Board and examined and many affidavits taken, and in addition the Board made an independent personal investigation of the premises and arrived at their plan of apportionment from the unanimous conclusion of all persons interviewed and all testimony taken, and that in the judgment of said Board the most fair and equitable manner of apportioning said benefits is upon an ad valorem basis, and that the benefits accruing to each parcel of real estate within the District, subject to assessment, is at least 15 per cent of

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the market value of said property; and that while in addition to the special benefits that accrue to the real estate in said District, there will be a general benefit to all property in the State of Colorado, that nevertheless there is a special benefit to the property lying within the District created by the Legislature and sufficient to justify the action taken by the Legislature in declaring said benefits and the action taken by this Board in making the assessment of said benefits.

VII.

Defendants, answering Paragraph 9 of said complaint, deny that the assessment of benefits was done prematurely, or that the
92 same was done before benefits could accrue to the property in said District, and allege that the property in said District became immediately benefited upon said act of the Legislature going into effect, and when there was a failure on the part of the real estate owners in the District to file a remonstrance, and when it was determined by said Board to carry out the provisions of said act, and further allege that said improvements will be completed before the property owners in said District could be called upon to pay any assessment in the event that such contingency should ever arise.

VIII.

93 In answer to Paragraph 10 of said Complaint defendants deny that the plan adopted

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for apportioning benefits or for levying assessments or the law pertaining to the levying of assessments, creates or will create unreasonable burdens against the property of the plaintiffs, and deny that it encumbers and creates liens against said property for an unreasonable length of time, and deny that the acts complained of will amount to taking the property of the plaintiffs or others in said District without just compensation and without due process of law, admits that the
94 Board, if it ever becomes necessary, will make assessments upon the improvements situated on real estate, but allege that the benefits to be derived from the improvements to be constructed will attach as well to the improvements as to the land upon which the improvements are situated.

IX.

In answer to Paragraph 11 of said complaint, defendants deny that the assessments made or to be made by the Commission in accordance with its resolutions against the property of plaintiffs and others similarly situated, is unjust or confiscatory or without regard to special benefits that might accrue to the property, and deny that the amount
95 of the assessment of benefits, or that the amount of the assessment that is authorized by the act, is in excess of the benefits that accrue to the property of the plaintiffs or others similarly situated. Defendants admit that the basis of apportionment is not upon

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distance, upon the front foot basis or upon the area basis, but alleges that under the circumstances applicable, and under the investigations made and the judgment arrived at by the Commission, the best and most equitable basis of apportionment is upon the ad valorem basis, and that if any inequalities exist the owners of real estate within the District are given, or will be given full opportunity to be heard as to whether their property is assessed in excess of benefits, as well as to whether or not it is assessed in proportion to benefits of other property within the District.

X.

In answer to Paragraph 12 of said complaint, defendants admit that the proceedings of the Board upon their face purport to make legal and valid assessments of benefits against all of the real estate in the District subject to assessment under the act of the legislature, but deny that said acts on the part of
97 the Board in making said assessments of benefits, liens or clouds are cast upon the property or the title of the property of the plaintiffs and others similarly situated, and deny that they will be without adequate remedy in the premises, and deny that said benefit assessments will be perpetual liens against said property, but admit that if it becomes necessary, as explained in other parts of this Answer, said Board will collect assessments as provided for in said act and in the resolutions passed by the Board pursuant thereto,

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and will do whatever is necessary in order to obey the mandates of the law and to carry out its provisions.

XI.

Defendants deny Paragraphs 13, 14, 15, 16
98 and 17 of said complaint.

XII.

In answer to paragraph 18 of said complaint, defendants deny that it was the intention of the Legislature in passing said act, or that it was the intention of the Board in adopting its resolutions, or other proceedings under said Act, to lend the aid or credit of the Moffat Tunnel Improvement District to the Denver & Salt Lake Railroad, or to other railroads, and allege that whatever benefit any railroad, or other corporation or person may derive or receive as the result of the
99 construction of said Tunnel, will be upon the basis of the use of the same being fully and adequately paid for by such railroad, corporation or other person, and that it is not the intention of said Board to make any donation, or gift or grant of any privileges connected with the improvements to be constructed except upon the fair value of said uses being paid for.

XIII.

100 Defendants deny Paragraphs 19, 20, 21, 22, 23, 24 and 25 of said complaint.

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XIV.

As to whether the plaintiff, Mary L. Milheim, is the owner of real estate of the value of $750,000, and as to whether the plaintiff, Frederick A. Metcalf, is the owner of real estate of the value of $100,000, the defendants have not and cannot obtain sufficient knowledge or information upon which to base a belief.

WHEREFORE, defendants pray that the action on the part of defendants herein be
101 dismissed, and that the defendants have judgment for their costs, and for such other further and general relief as to the Court may seem meet and proper in the premises.

NORTON MONTGOMERY,
ERSKINE MYER,
Attorneys for Defendants.

The reply of the Plaintiffs to the answer of the Defendants, filed August 9th, 1922,
114 omitting the caption and verification, is in words and figures as follows, to-wit:

Come now the Plaintiffs and replying to the answer of the Defendants:

They deny each and every allegation therein contained.

EDWIN M. PARK,
Attorney for Plaintiffs.

The answer of the Defendants to the petition in intervention of the intervening plain-

tiffs, the Wolfe Brothers Land Company, et
121 al., filed August 16th, 1922, omitting the caption and verification in words and figures as follows, to-wit:

123 The above defendants, answering the Petition in Intervention, herein allege and say:

1. That said petition in intervention does not state facts sufficient to constitute a cause of action, or any part of a cause of action against the defendants or any of them, or to entitle the intervenors to the relief prayed for or to any relief.

2. Defendants deny each and every allegation contained in said petition not herein specifically admitted or denied.

3. As to the allegations contained in Par-
124 agraphs 1 and 2 of said petition, these defendants have not and cannot obtain sufficient knowledge or information upon which to base a belief.

4. In answer to Paragraph 4 of said Petition these defendants expressly adopt their allegations contained in their Answer filed herein to the Complaint, and desire to have the allegations in said Answer apply to the
125 adopted provisions of said intervenors in said complaint.

5. In answer to Paragraph 5 of said petition, defendants deny that the improvements provided for in said Bill will not be for the special benefit of the property within the boundaries of said Improvement District.

6. Defendants deny Paragraph 6 of said Petition.

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7. In answer to Paragraph 7 of said Petition, defendants deny that the Legislature of the State of Colorado deliberately or wilfully perpetrated a fraud upon the land owners of said District, or that said Legislature framed the Moffat Tunnel Act in order that the time fixed by said Act was so short as to prevent action on behalf of the real estate
126 owners in said District; and on the contrary allege that no action was attempted to be taken to have such a petition circulated, and that whether or not such a remonstrance was provided for by said Act it would have nothing to do with due process of law.

8. Defendants deny Paragraph 8.

9. As to the allegations contained in Paragraphs 8a, 9 and 10, these defendants state that said allegations are so uncertain and indefinite that Defendants are not able to determine the allegations of ultimate fact sought
127 to be plead by said Intervenors, and for that reason has not and cannot obtain sufficient knowledge or information upon which to base a belief of the allegations attempted to be made therein. Defendants deny, however, that there is any attempt by said Bill to reimburse railroads on account of subsequent rents or otherwise, and allege that any reimbursement provided for is to be made by other lessees and not by said District.

10. Defendants deny Paragraphs 11, 12,
128 13 and 14 of said Petition.

WHEREFORE, defendants pray that the Petition in Intervention herein be dismissed,

and that the defendants be afforded relief as prayed for in their answer to said complaint.

NORTON MONTGOMERY,
ERSKINE MYER,
Attorneys for Defendants.

The reply of the intervenors and plaintiffs, The Wolfe Brothers Land Company, et al., filed August 26th, 1922, omitting the caption and verification, in words and figures, as follows, to-wit:

132 Now comes said intervening plaintiffs and in reply to the answer filed by Defendants, say:

They deny all new matters. set up in said answer.

THE WOLFE BROTHERS LAND COMPANY,
JOHN ROBERTSON SMITH,
By John R. Smith,
Their Attorney.

The petition in intervention of intervening plaintiffs, Torrence White, et al., filed the 25th day of August, 1922, omitting the caption and verification, in words and figures as follows, to-wit:

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Come now Torrence White, Sr., John S. Calkins, Laura E. Mingus, H. A. Calkins, R. T. Calkins, W. H. Ketner, John Wick, J. H. Denslow, C. E. Allen, T. E. Secrest, Ora Legge, A. F. Bedwell, J. V. Vacher, H. D. Evans, J. P. Miller, Mary A. Evans, Margaret Cole, Clara Kimbraugh, Isaac Truitt, K. O. Graves, H. J.

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Juchem, Pauline Putman, Anna E. Juchem, August G. Brumm, C. F. Wilson, G. S. Shackler, O. E. Ohlson, Richard McNulty, D. M. Scott, L. A. West, Torrence White, Jr., Dulcina White, W. C. Moreland, A. V. Moreland, Claude D. White and Lulu H. Corbin, intervening herein on their own behalf and all other taxpayers and land owners in the Moffat Tunnel Improvement District similarly situated and interested, by Barnwell S. Stuart, their attorney, and file this, their petition in intervention in the above entitled cause and allege:

1. That the petitioners named herein are residents of the County of Jefferson in the State of Colorado, and that they severally own lands situate, lying and being in the said County of Jefferson, State of Colorado, and within the boundaries of The Moffat Tunnel District, so-called, attempted to be created by the Act of the Legislature of the State of Colorado in Special Session, known as the Moffat Tunnel Act. That the lands owned by the said intervenors herein named are situated in Townships One (1), Two (2), and Three (3) South, Range Sixty-nine (69) West of the Sixth (6th) Principal Meridian, and Township Two (2) South, Range Seventy (70) West of the Sixth (6th) Principal Meridian, and Township Two (2) South, Range Seventy-one (71) West of the Sixth (6th) Principal Meridian, in Jefferson County, Colorado, and the aggregate amount of lands so owned by them and so situated is, to-wit,

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Eleven Thousand, Seven Hundred and Seventy-three (11,773) acres, and the aggregate value of said lands is, to-wit, Five Hundred and Seventy-five Thousand Dollars ($575,000).

2. These intervenors do hereby expressly adopt, accept and confirm the complaint, exhibits and each and all of the allegations of the complaint contained in paragraphs I to
139 XXV, both inclusive thereof, filed by the original plaintiffs in the hereinabove entitled cause, and also hereby expressly adopt, accept and confirm the petition in intervention and each and all of the allegations of the petition in intervention contained in paragraphs 3 to 16, both inclusive thereof, filed in the hereinabove entitled cause by The Wolfe Brothers Land Company and John Robertson Smith, as intervenors and plaintiffs therein,
140 all to stand as part of the allegations of this petition and complaint, the same as if repeated and set forth at length herein, and as stating in part the cause of action of these intervening plaintiffs.

3. These intervening plaintiffs, without prejudice to any of the allegations and averments of the said original complaint and the said petition in intervention hereinabove mentioned, and in addition and supplementary thereto, do hereby further allege and set forth matters and things justifying and requiring the granting of the relief demanded in the original complaint and in said petition in intervention of the said Wolfe Brothers

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Land Company and John Robertson Smith and in this petition, to-wit: that in the Act described in the original complaint and set out therein as the Moffat Tunnel Bill, and
141 hereinafter so designated for the sake of brevity, and especially in and by Section Eleven (11) thereof, it is declared that the special benefits accruing to the real estate in said District to be assessed are in excess of the cost of the improvements provided for by said Act and in excess of the assessments against said real estate provided for therein; that said Act and the purposes thereof as appears upon its face is not an Act to provide revenue for public purposes, and that whereas the Legislature has, in and by said Act in said Section Eleven (11) thereof, as well as in Section One (1) thereof, declared that special benefits accrue to the extent and in the man-
142 ner so declared, to the real estate in said District to be assessed, yet, notwithstanding such determination and declaration by the Legislature the accrual of special benefits, as well as the extent of such benefits was and is a judicial question and not a legislative question.

4. That the said Moffat Tunnel Bill and the proceedings of the Commission thereunder are in violation of Section Fourteen (14) of Article Two (II) of the Constitution of
143 the State of Colorado, in that, the intent and purpose of said Act and the said proceedings thereunder and the result thereof, is to take private property of the citizens of the State,

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to-wit, of the intervenors and plaintiffs and all others similarly situated, for private use without their consent.

5. That the said Act and the proceedings of the Commission thereunder are in violation of Section Fifteen (15) of Article Two (II) of the Constitution of the State of Colorado, in that, said Act and the provisions thereof and the result thereof, and the proceedings of said Commission thereunder, is an attempt to take the private property of citizens of the State, to-wit, the intervenors and plain-
144 tiffs and all others similarly situated, for a quasi-public or private use only and without just compensation.

6. That the Legislature of the State of Colorado has attempted in and by said Moffat Tunnel Bill to exercise the power, if any it had, to establish a special taxing District within which a special tax is to be levied, assessed and collected upon the lands therein situate, and that in and by said Bill, for said purpose, has designated and established the certain boundary lines in said Bill set forth.
145 That in fixing and establishing said boundary lines it has exceeded its said power, if any it had, in that said boundary lines so established are and were arbitrarily fixed, and there was and is no reasonable ground or basis in fact, or in law, or in equity, for the said determination and establishment thereof; that the nature and character of the structure, or so-called improvement, provided for by said Act and the location thereof and the

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146 method and manner of use of said structure, and the location and locations of the lands lying within the said boundary lines established by said Act, make it impossible to reasonably determine and declare that any special benefit or benefits, or any benefits at all, accrue or will accrue to said lands or any thereof; or, that no special benefit or benefits accrue to lands outside and beyond said boundary lines but lying adjacent thereto; or, to reasonably determine that a special benefit or special benefits accrue to said lands lying within said boundary lines to any greater extent than to lands lying outside of said boundary lines but adjacent thereto.

7. That the said Moffat Tunnel Bill and the proceedings of the Commission thereun-

147 der to carry out the terms and provisions of said Act are in contravention of Section Twenty-five (25) of Article Five (V) of the Constitution of the State of Colorado, in that it is thereby attempted by a special law, local and special in its operation, to lay out and open a road or highway in the State of Colorado, to-wit, a road or highway for the purpose of railroad and automobile transportation through James Peak from a point on the east side thereof to a point on the west side thereof, as designated in said Act.

8. That the declared purpose and intent of said Moffat Tunnel Bill is to construct a tunnel for railroad transportation for the ben-

148 efit of, and to enable the Denver & Salt Lake Railroad Company, a private corporation, to

continue in business and conduct its private enterprise of railroad transportation in the State of Colorado, and save the railroad of said Company, and the operation thereof by it, to the people of the State of Colorado, and that said Act and the provisions thereof and the proceedings of the Commission thereunder have been and are enacted and adopted with said intent and for said purpose, and
149 with the intent and purpose of leasing the said tunnel to said The Denver & Salt Lake Railroad Company, and are in violation of the provisions of Sections One (1) and Two (2) of Article Eleven (XI) of the Constitution of the State of Colorado, in that the said Act and provisions thereof and proceedings thereunder for its enforcement, lend and pledge the aid and credit of the Moffat Tunnel Improvement District, created by said Act and constituting supposedly a public corporation, municipal in character, for governmental purposes in the State of Colorado, to the said The Denver & Salt Lake Railroad Company; and, in that, they donate the property of the plaintiffs and intervenors and of
150 all other land owners in said District in aid of said The Denver and Salt Lake Railroad Company, and in and by virtue of said provisions and proceedings the said District and the inhabitants and taxpayers therein become and are joint owners of and jointly interested in said tunnel and the uses thereof with the said The Denver and Salt Lake Railroad Company, a private corporation, as well as with

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all other private corporations, operating and conducting private enterprises in, upon and through said tunnel, under the provisions of said Moffat Tunnel Bill, and the said District, comprising the lands and taxpayers therein as provided and established by said Act, becomes and is a co-partner in the operation and
151 maintenance of said tunnel, with said The Denver and Salt Lake Railroad Company, and as well with the other private corporations operating and conducting private enterprises in, upon and through said tunnel.

9. That the said Moffat Tunnel Commission, in pursuance of the provisions of said Act contained in Sections Six (6), Eight (8) and Nine (9) thereof, has adopted plans and specifications for the work and structure contemplated by the said Moffat Tunnel Bill,
152 including railroad track laid in place on the floor of said tunnel, and intends to and will proceed to lease the use of said tunnel for railroad transportation through the same to The Denver and Salt Lake Railroad Company for a period of Ninety-nine (99) years, and in and by said lease, in pursuance of the provisions of said Moffat Tunnel Bill and said proceedings of the said Moffat Tunnel Commission thereunder, the said railroad company, its successors and assigns, will be granted an easement and right of way, and an interest, in, through and upon the structure, to-wit,
153 the said Moffat Tunnel, for the operation of its railroad, railroad cars, engines and trains, in violation of the provisions of Section

Twenty-five (25) of Article Five (V) of the Constitution of the State of Colorado that no local or special law shall be passed granting to any corporation, association or individual any special or exclusive privilege, immunity or franchise whatever.

10. That in and by Sections Two (2), Six (6), Eleven (11), Sixteen (16), and Seventeen (17), the said Moffat Tunnel Bill provides for the construction of a tunnel for railroad transportation, power transmission, telephone and telegraph lines and the transportation of automobiles and other vehicles,
154 and levies and authorizes levy of a tax for the construction, operation and maintenance of such tunnel, upon certain lands within a specifically described area or district within the State of Colorado, in violation of Sections Two (2) and Three (3) of Article Ten (X) of the Constitution of the State of Colorado limiting the power of taxation in the Legislature to a tax for Governmental or public purposes only, and requiring that all such taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, in that the said tax
155 attempted to be authorized by said Act is not for any Governmental or public purpose and as authorized to be levied upon only a certain small portion of property within the confines of the State of Colorado to the exclusion of all other property in said State of the same class.

WHEREFORE, These intervenors and

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plaintiffs pray that they be joined as plaintiffs intervening in this cause, and that they may have all the relief prayed for in the original complaint and all such other and further relief as they may show themselves to be en-
156 titled to and as may, to the Court, seem meet and proper in the premises.

TORRENCE WHITE, Sr.,
JOHN S. CALKINS, and
LAURA E. MINGUS, and
Thirty-three (33) Others,
Intervenors and Plaintiffs.
By Barnwell S Stuart,
Attorney.

The amendment to the petition in intervention by Torrence White et al., filed the 28th day of August, 1922, omitting the caption and verification, in words and figures as follows, to-wit:

161 Comes now Torrence White Sr., et al., intervening plaintiffs in the above entitled cause, by their attorney, Barnwell S. Stuart, and with leave of Court first had and obtained, do make and file herein the following amendment to their petition in intervention, to be and stand as paragraph Eleven (11) of said petition, as if set forth therein as such paragraph, to-wit, they allege and say:

11. That the said act and the proceedings of the Commission thereunder are in violation of the Fourteenth Amendment of the Constitution of the United States, and in violation

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162 of Section 25, Article 11, of the Constitution of the State of Colorado, and is an attempt to deprive the citizens of the State, to-wit: The plaintiffs and all others similarly situated, of their property without due process of law, in this: that the said Act and proceedings do not provide for a disinterested tribunal for the levying and assessment of the tax upon the lands of the plaintiffs.

TORRENCE WHITE, Sr.,
JOHN S. CALKINS, and
Thirty-three Others,
Intervenors and Plaintiffs,
By Barnwell S. Stuart,
Attorney.

163 The answer of the Defendants to the petion in intervention of Torrence White, et al., filed August 28th, 1922, omitting the caption and verification, in words and figures as follows, to-wit:

167 The above defendants answering the petition in intervention herein allege and say:

1. That the said petition in intervention does not state facts sufficient to constitute a cause of action or any part of a cause of action against the defendants or any of them, or to entitle the intervenors to the relief prayed for or to any relief.

2. Defendants deny each and every allegation contained in said petition not herein specifically admitted or denied.

3. As to the allegations contained in paragraph 1 of said petition, these defendants

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168 have not and cannot obtain sufficient knowledge or information upon which to base a belief.

4. In answer to paragraph 2 of said petition, these defendants expressly adopt their allegations contained in their answer filed herein to the complaint, and desire to have the allegations in said answer apply to the adopted provisions of said intervenors in said complaint.

5. In answer to paragraph 3 of said petition the defendants state that the said allegations are so uncertain and indefinite that the defendants are not able to determine the
169 allegations of ultimate fact sought to be pleaded by said intervenors and for that reason they have not and cannot obtain sufficient knowledge and information upon which to base a belief of the allegations attempted to be made therein, and therefore deny the same and the defendants deny further that the improvements provided for in said Moffat Tunnel Bill will not specially benefit the real estate within the boundaries of the Moffat Tunnel Improvement District, and that the cost of said improvements will be in excess of the special benefit accruing to the real
170 estate within the District by reason of the construction of said improvements.

6. Defendants deny paragraphs 4, 5, 6, 7, 8, 9 and 10 of said petition.

WHEREFORE, the defendants pray that the petition in intervention herein be dis-

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missed and that the defendants be afforded
171 relief as prayed for in their answer to the said complaint.

NORTON MONTGOMERY,
ERSKINE MYER,
Attorneys for Defendants.

The supplemental answer of the defendants to the complaint filed August 28th, 1922, omitting the caption and verification, in words and figures as follows, to-wit:

Now comes the defendants in the above
174 entitled action and further answering plaintiffs herein allege and say:

As a Further and Second Defense:

That the Moffat Tunnel Improvement District Law provides that the Moffat Tunnel Commission may adopt rules and regulations providing for hearing and notice to all owners of real estate within the Moffat Tunnel Improvement District, at which hearing evidence and argument may be submitted regarding the correctness and legality of the appraisal of benefits accruing to the real estate within the District by reason of the improvements provided to be constructed by said Moffat Tunnel Improvement District Law; that said Moffat Tunnel Commission adopted by resolution certain rules and reg-
175 ulations regarding notice and hearing upon the appraisal of benefits, which resolution is attached to complaint herein as Exhibit "B," in which resolution it was provided that all

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exceptions or objections to the appraisal of benefits made by said Commission must be filed in the office of the said Commission in the State Capitol in the City and County of
176 Denver, State of Colorado, on or before the 23rd day of August, 1922, and further that all exceptions and objections to the appraisal of benefits be heard and determined by the Moffat Tunnel Commission at the office of the Commission in the State Capitol in Denver, Colorado, commencing on the 25th day of August, 1922, at the hour of 10 o'clock a. m.; that due notice of the time and place of filing exceptions and objections to said appraisals of benefits and the time and place of hearings on the exceptions and objections to the appraisal of benefits, was given to all owners of
177 real estate within the Moffat Tunnel Improvement District; that said plaintiffs herein nor any of them, have filed exceptions or objections to the appraisal of benefits as provided by the rules and regulations of the Moffat Tunnel Commission, and as provided and contemplated by the Moffat Tunnel Improvement District law as above set forth.

WHEREFORE, the defendants pray the action on the part of the defendants herein be dismissed and that the defendants have judgment for their costs and for such other further and general relief as to the Court may seem meet and proper.

NORTON MONTGOMERY,
ERSKINE MYER,
Attorneys for Defendants.

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The supplemental answer to the petition in intervention of the Wolfe Brothers Land Company, et al., filed August 28th, 1922, omitting the caption and verification, in words and figures, as follows, to-wit:

Now comes the defendants in the above entitled action and further answering intervenors herein allege and say:

As a Further and Second Defense:

That the Moffat Tunnel Improvement Dis-
181 trict Law provides that the Moffat Tunnel Commission may adopt rules and regulations providing for hearing and notice to all owners of real estate within the Moffat Tunnel Improvement District, at which hearing evidence and argument may be submitted regarding the correctness and legality of the appraisal of benefits accruing to the real estate within the District by reason of the improvements provided to be constructed by
182 said Moffat Tunnel Improvement District Law; that the said Moffat Tunnel Commission adopted by resolution certain rules and regulations regarding notice and hearing upon the appraisal of benefits, which resolution is attached to the complaint herein as Exhibit "B," in which resolution it was provided that all exceptions or objections to the appraisal of benefits made by said Commission must be filed in the office of the said Commission in the State Capitol in the City and County of Denver, State of Colorado, on or before the 23rd day of August, 1922, and

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183 further that all exceptions and objections to the appraisal of benefits be heard and determined by the Moffat Tunnel Commission at the office of the Commission in the State Capitol in Denver, Colorado, commencing on the 25th day of August, 1922, at the hour of 10 o'clock a. m.; that due notice of the time and place of filing exceptions and objections to said appraisal of benefits and the time and place of hearings on the exceptions and objections to the appraisal of benefits, was given to all owners of real estate within the Moffat
184 Tunnel Improvement District; that said intervenors herein nor any of them, have filed exceptions or objections to the appraisal of benefits as provided by the rules and regulations of the Moffat Tunnel Commission, and as provided and contemplated by the Moffat Tunnel Improvement District law as above set forth.

WHEREFORE, the Defendants pray the action on the part of the defendants herein be dismissed and that the defendants have judgment for their costs and for such other further and general relief as to the Court may
185 seem meet and proper.

NORTON MONTGOMERY,
ERSKINE MYER,
Attorneys for Defendants.

The supplemental answer of the Defendants to the petition in intervention of Torrence White, et al., filed the 28th day of August, 1922, omitting the caption and verifica-

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tion, in words and figures, as follows, to-wit:

Now comes the defendants in the above
189 entitled action and further answering intervenors herein allege and say:

As a Further and Second Defense:

That the Moffat Tunnel Improvement District Law provides that the Moffat Tunnel Commission may adopt rules and regulations providing for hearing and notice to all owners of real estate within the Moffat Tunnel Improvement District, at which hearing evidence and argument may be submitted regarding the correctness and legality of the appraisal of benefits accruing to the real estate within the District by reason of the improvements provided to be constructed by
190 said Moffat Tunnel Improvement District Law; that the said Moffat Tunnel Commission adopted by resolution certain rules and regulations regarding notice and hearing upon the appraisal of benefits, which resolution is attached to the complaint herein as Exhibit "B," in which resolution it was provided that all exceptions or objections to the appraisal of benefits made by said Commission must be filed in the office of the said Commission in the State Capitol in the City and County of Denver, State of Colorado, on or before the 23rd day of August, 1922, and
191 further that all exceptions and objections to the appraisal of benefits be heard and determined by the Moffat Tunnel Commission at the office of the Commission in the State Cap-

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itol in Denver, Colorado, commencing on the 25th day of August, 1922, at the hour of 10 o'clock a. m.; that due notice of the time and place of filing exceptions and objections to said appraisal of benefits and the time and place of hearings on the exceptions and objections to the appraisal of benefits, was given to all owners of real estate within the Moffat Tunnel Improvement District; that said intervenors herein nor any of them, have filed exceptions or objections to the appraisal of
192 benefits as provided by the rules and regulations of the Moffat Tunnel Commission, and as provided and contemplated by the Moffat Tunnel Improvement District law as above set forth.

WHEREFORE, the Defendants pray the action on the part of the defendants herein
193 be dismissed and that the defendants have judgment for their costs and for such other further and general relief as to the Court may seem meet and proper.

NORTON MONTGOMERY,
ERSKINE MYER,
Attorneys for Defendants.

BILL OF EXCEPTIONS

And thereupon plaintiffs and intervenors, to sustain the issues on their part, gave and offered the following evidence, to-wit:

TORRENCE WHITE, being called on behalf of the plaintiffs, testified as follows:

DIRECT EXAMINATION

That he has been a resident, taxpayer and land owner in Jefferson County within the boundary lines of the Moffat Tunnel Improvement District for fifty-two years; that he has had experience in the past with matters of special benefit in respect to highways and transportation lines; that in his opinion the
220 proposed Moffat Tunnel would be of no benefit to the land which he owned within the District; that the land that he owned within the District lay between the Moffat Railroad and the Colorado & Southern Railroad, and that further it would be of no benefit to land owned by irrigation corporations, and that the present facilities for railroad transportation were full and adequate for the full development of his land.

CROSS EXAMINATION

That since he had owned land within what is now the Moffat Tunnel Improvement District, the Colorado & Southern and the Moffat Railroads had both been built, and that neither had been of any special benefit which he could see to his land; that he thought it

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224 was of benefit to have railroads in the State, but that he did not see how it could benefit his land to have a transcontinental railroad operate through Denver; that any increase in the population of Denver, resulting from construction of better means of transportation, would not be of any benefit to his land because it would not enable him to raise any more products; that this was his opinion in regard not only to his land, but to other land in the same vicinity with which he was familiar.

RE-DIRECT EXAMINATION

MR. STUART offered in evidence a map marked "Intervening Plaintiffs' Exhibit 'A' ". Said exhibit was admitted.

(Witness continues.)

That his land had depreciated in value since the organization of the Moffat Tunnel Improvement District; that the mere fact of the existence of a tunnel as marked on Intervening Plaintiffs' Exhibit "A" would not in his opinion increase in any way the value of his land, not even if the tunnel were electrified and equipped; that the only thing that the farmers in his vicinity purchased that
230 came over the Moffat Railway was lumber and coal, and that lumber and coal had doubled in price since the Moffat Railroad was built; that the tunnel, with the co-operation of private enterprise, would be of no benefit to his land. That in his opinion transportation of merchandise and freight through the

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tunnel would be of more benefit to industry than to land, and that also the owners of stock and merchandise would be more especially benefited than the owners of land.

To the last immediately preceding statement counsel for defendants objected, on the ground that it was immaterial and irrelevant.

The Court sustained the objection.

Counsel for plaintiffs excepted.

RE-DIRECT EXAMINATION CONTINUED

That the construction of the Moffat Railroad, in relation to his land, had not reduced the price of lumber or coal used by him in the development of his land; that the fact
233 that the land lies within the Moffat Tunnel Improvement District does not increase the productive quality of his land.

To the last above and foregoing, counsel for the defendants objected upon the ground that it was a matter of which the Court would take judicial notice. Objection sustained.

RE-CROSS EXAMINATION

Witness admitted that he now had to pay more for farm machinery than he did five or six or seven years ago, but that he didn't know whether the Moffat Railroad had anything to do with it or not.

RE-DIRECT EXAMINATION

That he was a subscriber to the Colorado Transcript and that he saw therein public notice to all land owners within the Moffat

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Tunnel Improvement District for filing ob-
234 jections and exceptions to assessments and appraisal of benefits made by the Moffat Tunnel Commission; that the said notice was in said paper two weeks and that he did not see it in any Denver newspaper.

JOSEPH PEARSON, a witness called by the intervenors and plaintiffs, testified in their behalf as follows, to-wit:

DIRECT EXAMINATION

That he was a resident, taxpayer and land owner at Wheatridge, Colorado, within the boundaries of the Moffat Tunnel Improvement District, in Adams County, and also in
253 Jefferson County; that his land in Adams County is about 2,000 feet from the line of the Moffat Railroad and that his land is six blocks from the city limits of Denver; that he has adequate means of transportation from his land to the City of Denver over an improved highway and that neither the Colorado & Southern nor the Moffat Railroad were useful to him as a means of transportation between his land and the City of Denver; that railroad transportation would not be of any more benefit to his land which lay next to the City of Denver than it would to land ten miles further east or further south, but that in his opinion any land lying around Denver with a good railroad coming in, which would benefit the City of Denver, would benefit that land; that if the construction of the tunnel some forty or fifty miles away, under

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the Continental Divide, would benefit the City of Denver, it would benefit his land to a certain extent, but not in his opinion in proportion to the cost to his particular piece of land or to the land of the people within that particular district; that it would benefit his land in proportion as it would benefit all surrounding land, or all counties surrounding Denver; that judging from the effect of the Moffat Railroad at the present time upon his land and the purchase price which he paid for it, the railroad would have to change mightily to increase the value of his land and that the mere construction of the tunnel itself, not connected with any private enterprise, would not in his opinion benefit his land; that instead of the organization of this District being of special benefit to his land that he believed it would be a detriment up to the present time, but that if it benefited other land surrounding Denver, it would benefit his land likewise; that there was no special benefit accruing to his land located just within the District different from the benefit accruing to other land lying just outside of the District and north of it; that the construction of the tunnel in itself, aside from co-operation with private en-
275 terprise, would not benefit his land because it would not even benefit the land in the City of Denver and would tap no territory that could be of benefit to the City of Denver; that upon the assessed valuation of $31,000, an appraisal of benefits at 15 per cent, being $4,650, is in excess, in his opinion, of the

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amount of benefits accruing to his land by reason of the organization of the District.

CROSS EXAMINATION

That if the $4,650 was distributed over a period of forty or fifty years, that then the cost of the improvement would be worth the benefits accruing to his land; that he was acquainted to a degree with the products of
278 northwest Colorado within the Moffat Tunnel Improvement District.

RE-DIRECT EXAMINATION

That the natural increase in the value of his property was about $120 per year in case the tunnel was built and the road operated
281 serviceably, but not as it was run to date.

W. C. MORELAND, being called by the plaintiffs and intervenors, testified in their behalf as follows:

That he was a resident, taxpayer and land owner in Jefferson County, six or seven miles northeast of Golden, and his land is about 2½
282 miles from the Moffat Railroad and about the same distance from the Colorado & Southern, and that the construction of the Moffat Tunnel would be of no special benefit to his land in any way that he knew of; that he had ample railroad facilities at the time.

W. H. KETTNER, being called by the plaintiffs and intervenors, testified in their behalf as follows:

That he was a resident, taxpayer and land owner living about six miles northwest of

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Arvada, within the Moffat Tunnel Improvement District, about five miles from the Moffat Railway and about one mile from the Colorado & Southern Railroad, Boulder branch; that he has service from steam and electric roads, and passenger and freight
285 service; that in his opinion the building of the tunnel under the Continental Divide would not in any manner benefit his property, even though it were constructed and operated with other lines of railroad; that he has all the facilities of railroad transportation which his land needs; that the hauling of coal from Moffat or Routt Counties, or timber or stock, would not benefit his land; that he has never patronized the railroad a dollar's worth and that he hauls his coal from the Boulder coal fields.

CROSS EXAMINATION

That he did not believe the tunnel would be of benefit to him or to the owner of his land in the future if the Moffat Railroad is operated as a local road; that the building of the tunnel and the operation of it successfully
290 would be a benefit to Denver and the property in Denver; that the operation of the tunnel and railroads would bring the products of the Moffat country into Denver, including coal, lumber and cattle, but that it would not be of any benefit to his land as far as he could see, and even if it reduced the price of coal, it would be of very little benefit to him, for he used but a few tons a year; that if the price of coal was reduced 50c a ton, it would not in

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his opinion benefit his land in proportion to the cost; that the Colorado & Southern Railroad running near his land did not benefit it any because it did not increase its productivity; that he could not say whether or not any of the railroads leading into Denver were an advantage to his land, and that if his land was 100 miles away from a railroad it would probably have an equal earning power.

RE-DIRECT EXAMINATION

That as regards the market value of his land, the Moffat Tunnel Improvement District was a decided detriment, making it prac-
297 tically unsalable in his opinion; that he could not see how it was any more benefit to his land than to any other land in the same district served by the same railroad; that any special benefit accruing to land just north of it and within the District accrued also to land lying north of it and without the District.

JOHN S. CALKINS, a witness called by the intervenors and plaintiffs, testified in their behalf as follows:

That he is a resident, land owner and taxpayer within the Moffat Tunnel Improvement District, owning 90 acres about 4½ miles
301 north of Arvada and 400 acres in the mountains; that the 90 acres were about 3½ miles from the Moffat Railroad and in the right-of-way of the Colorado & Southern Railroad, and about six miles from Denver. That in his opinion the construction of the tunnel

under the Continental Divide would not benefit the 90 acres near Arvada or the 400 acres owned by him in the mountains near the line of the Moffat Railroad, because the latter was grazing land.

CROSS EXAMINATION

That in his opinion the country west of the Continental Divide would probably be benefited by the construction of the tunnel,
306 and probably the land within the City and County of Denver. That he was not an expert on these matters and that railroad transportation was a benefit to a certain amount; that it would be a benefit to the City of Denver to have a railroad coming in from the East; that it would be a benefit to have two railroads coming in if they tapped different localities. That he understood that preliminary surveys had been made for other railroads to tap the Moffat country and that if there was more than one railroad into the Moffat country, the second railroad would be of no benefit in his opinion. That inasmuch as the tunnel proposal was an indefinite and temporary proposition he did not see how the Moffat tunnel itself could be a benefit to the Moffat country.

JOHN ROBERTSON SMITH, an intervenor, and a witness called by the plaintiffs and intervenors, testified in their behalf as follows:

That he is an attorney at law, the owner of land and a taxpayer and a resident within

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315 the Moffat Tunnel Improvement District, owning 60 lots adjoining the City of Denver and 80 acres near Broomfield; that the lots adjoining the City of Denver were served by the Colorado & Southern, the Burlington, and the Interurban, where they came together at Utah Junction; that the land near Broomfield was served by the Colorado & Southern, which ran less than a mile away, and that the Moffat Railroad was five miles from that land.

Counsel for the plaintiffs objected to his testifying as to special benefits accruing to any of the lands owned by the witness on the ground that he was not qualified. Objection overruled, on the ground that he was testifying as to his own land and not as an expert.

Exception saved.

(Witness continues.)

That he thought the construction of the tunnel would be of some benefit to the land at Utah Junction, first, from the increase of

318 business by the Moffat Railroad, and, secondly, from the hoped-for increase of population in the City of Denver; that the land which he owned near Broomfield would in his opinion be not affected at all, but that both benefits would be speculative and uncertain.

Objection by counsel for the plaintiffs to leading questions. Objection sustained.

(Witness continues.)

That he would prefer not to testify as an expert witness in regard to the increase in

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the value of the land by added transportation or construction of the railroads through the country, because he was an attorney in the case. He preferred to testify only to facts within his own knowledge.

CROSS EXAMINATION

That the reason why he thought the land near Broomfield would not be benefited was entirely on account of its remoteness from
323 the railroad; that the general benefits derived would be so slight as to be negligible as to this land. That in case Denver doubled in population the land near Broomfield would be benefited generally, but not specially, and then only the same as all other land in the neighborhood; that there was in his opinion no benefit that could be ascertained. That if, by reason of the construction of the tunnel, a transcontinental railroad route resulted across the United States, with Denver as the principal city, and the population and industries of Denver were greatly increased, that all property within 10 or 15 miles of Denver would be benefited, but that there was no difference in the benefit to his land which was assessed than other lands near by which were
327 not assessed, and that the benefit would in his opinion be uniform. That he did not know where the benefit would stop, but that he thought it would go very far beyond the lands that were liable to assessment. Also that all the intervening plaintiffs own lands within

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the Tunnel District as alleged in their petitions.

Counsel for the plaintiffs here stated that Mrs. Milheim, plaintiff, was the owner of real estate in Denver, valued approximately at $750,000. This was admitted by counsel for the defendants, and also that Mr. Metcalf, plaintiff, owned $100,000 worth of real estate in Routt County.

Counsel for intervening plaintiffs thereupon offered in evidence Senate and House Journals of the Extra Session, 1922, respectively marked "Exhibits B and C." The same were admitted as to those parts of said Journals which pertained to the Moffat Tunnel Bill.

Counsel for the intervening plaintiffs thereupon offered statistics taken from the records of the State Immigration Commission
331 and from the United States Census of 1920, pertaining to patented land, land inclusive as to ownership, government land, open and homesteaded land, unpatented State land, national forests, total area, occupied area, total unoccupied area, the land area of the counties, population, farms, number of farm owners, total number of farms, size of farms, total area of farms within the Moffat Tunnel Improvement District. They were offered in evidence as Exhibit "D."

Counsel for the plaintiffs objected on the ground that they were immaterial.

Objection overruled; exception saved, and the same were admitted in evidence.

Counsel for defendants objected to Exhibits "B" and "C" on the ground that they were immaterial, no issue being raised by the pleadings.

Objection overruled; exception saved.

Counsel for plaintiffs offered in evidence intervening plaintiffs' Exhibit "E." Offered for the purpose of showing the State Highways in relation to the District. Same admitted.

Counsel for intervening plaintiffs offered in evidence Exhibit "F," showing contour and character of the country. Same was admitted.

Counsel for intervening plaintiffs offered
348 in evidence Exhibits "G," "H" and "I," being United States maps showing the topography of the country. Same admitted.

Counsel for the intervening plaintiffs thereupon read into the record the assessed valuation of real estate in the respective counties and parts thereof within the Moffatt Tunnel Improvement District.

THEREUPON, the defendants, to sustain the issues on their part, gave and offered in evidence, the following:

L. D. BLAUVELT, called by the defendants, testified in their behalf as follows:

That he has been a resident of Colorado
349 for more than 30 years; civil engineer by profession, being a graduate of Rutgers' College of Engineering, New Brunswick, New Jersey. That he had been engaged in the

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business of civil engineer for 30 years, and was experienced in railroad tunnel building, having built seven tunnels on the Cripple Creek Short Line and 55 tunnels on the present Moffat Railroad. That he was familiar with the Moffat Tunnel Improvement District; knew the territory that the District covered; was acquainted with the Moffat Railroad throughout its entire length; had served on the Moffat road as locating engineer, engineer in charge of construction, chief engineer, general superintendent of operations. At present was chief engineer for the Moffat Tunnel Commission; that the location of the tunnel had been fixed after consultation with three other consulting engineers, J. Vipond Davies of New York, J. Waldo Smith of New York, and David Brunton of Denver, who were men of experience in civil engineering and matters involving questions such as would arise in a matter of this kind. That the survey of the line of the tunnel had been made and adopted from original surveys made in 1903, completed in 1914; that many lines were run to determine the practical location of elevation and length of various tunnels, finally resulting in the location of a tunnel six miles long at its present site; that he directed all of the surveys mentioned; that the length of the tunnel was 6.04 miles; that the elevation of the eastern portal was 9,190 feet; western portal, 9,100 feet above sea level; that plans had been adopted for the construction of the tunnel; that it was to be

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constructed as a railway tunnel, 16 feet wide by 24 feet in height, construction aided by means of a parallel auxiliary tunnel 50 to 75 feet distant from main bore, 8 by 8 feet in dimension; that the auxiliary tunnel could be used for transportation of water and for other
358 purposes; that the estimate of the cost of the improvement, completed, including the auxiliary tunnel, was $6,720,000, the amount of bonds authorized to be issued by the Commission; that this estimate was concurred in by the consulting engineers; that it included a reasonable allowance for contingencies; that the tunnel would be of benefit to the operation of a railroad through it rather than over Corona Pass. That it would eliminate 11,000 degrees of curvature on the present Denver & Salt Lake Railroad; reduce the elevation of the present track approximately 2,600 feet; reduce the degree of curvature from 16 degrees to 9; would remove the most serious objection to the present Denver & Salt Lake on 4 per cent grades and 15 per cent curvature above timber line and snow-swept areas. That no other railroad was immediately tributary to the tunnel, but that the Denver & Rio Grande Railroad, situated 42 miles distant from a point on the Moffat Railroad west of the tunnel 80 miles, by means of a cut-off with a water grade not to exceed three-quarters of 1 per cent, could connect with the Moffat Railroad and use the Moffat tunnel when
363 constructed, saving thereby 174 miles in distance between Dotsero and Denver; that the

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tunnel would save the present Denver & Salt Lake Railroad approximately $900,000 per annum, based upon the cost of operation and moving freight on the basis of the cost per ton mile; that the distance saved on the Denver & Salt Lake Railroad was 23½ miles, in addition to the elevation and weather conditions to be overcome. That the maximum grade of the Denver & Salt Lake Railroad was 4 per cent, and with the tunnel the maximum grade would be 2 per cent for seven miles immediately west of the west portal of the tunnel against east-bound traffic, and for four or five miles between Toponas Summit and Phippsburg as against west-bound traffic. That the maximum grade would be reduced from 4 per cent to 2 per cent. That under favorable conditions it would take four years
367 to construct the tunnel, allowing for contingencies, and under ideal conditions 3½ or 3¼ years. That the estimate of cost included the interest on money used during construction for a period of four years.

CROSS EXAMINATION

That the site fixed for the tunnel was approximately the same as that fixed several years ago when the City of Denver tried to
368 build it alone; that the approaches to the eastern and western portals of the tunnel would practically connect with the Denver & Salt Lake line; that the reduction in grades and curves testified to on direct examination is applicable to the Denver & Salt Lake as

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now constructed. That the figures given in direct examination were based largely upon surveys made several years prior to this time and brought up to date for the present prices of labor and material. That he was not prepared to state that construction of the tunnel would be as great a benefit to Grand Valley as it would be to Moffat County, even with the Dotsero cut-off. That he had made an estimate of the saving of the Denver & Rio Grande Railroad on a certain proportion of its business originating west of Dotsero and destined to points, Denver or east; and originating in Denver and east of Denver and destined to points west of Dotsero, and that the saving would be about $800,000 a year, after due allowance had been made for trackage payments to the Moffat road and the use of the tunnel. That a saving of 174 miles on the Denver & Rio Grande line would pre-
374 sumably cut the freight rate and passenger rate, although those matters are controlled by the Interstate Commerce Commission and the witness was unable to state it as a fact. That there would be a comparative benefit to Grand Valley in the construction of the tunnel, if the reductions in freight rates on commodities originating in the Grand Valley took place. That in making his estimate of cost the witness considered the possibility of encountering a vein or slide or slip matter, as advised by the state geologist; that the
377 greatest depth from the surface to a point in the tunnel would be 2,900 feet; that the terri-

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tory between Dotsero and State Bridge would only be benefited by a cut-off from Dotsero to State Bridge.

CROSS EXAMINATION

That the witness had made a survey for the Denver & Salt Lake Railroad of the proposed Dotsero cut-off, together with a location survey of 42 miles, and the estimate of cost was approximately $45,000 per mile, ready for operation; that in his opinion the Moffat road would not necessarily become a part of the Denver & Rio Grande system. That the Dotsero cut-off would give all Moffat country an outlet to the West as well as allow eastbound traffic to come up and through the tunnel; that it would have a tendency to unify the system. That in his judgment the rest of the Moffat road from Craig to Salt Lake would be built, even if the Dotsero cut-off were made for the development of the territory west of the present terminus of the Moffat road. That if the Denver & Salt Lake were continued to Salt Lake City, the distance from Denver to Salt Lake in round numbers over the Denver & Salt Lake road would be 555 miles, and the distance from Denver to Salt Lake over the Denver & Rio Grand Railroad, via the Dotsero cut-off and Moffat tunnel would be 568 miles. That the location of the tunnel was determined by the fact that it was the shortest distance at an elevation of approximately 9,000 feet westerly and contributary to Denver that a tunnel

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could be driven through the range at that elevation and length; that this statement was based upon surveys personally made and directed of the Continental Divide northerly
385 and southerly from the present location of the tunnel as far south as Berthoud and as far north as Arapahoe Peaks. That it was known at the time that the Denver & Salt Lake road was projected that the tunnel was an absolute necessity for it; that the line over the Divide was a temporary expedient only in order to get construction materials to the western front. That in his judgment there was no question that if the tunnel was completed, the Moffat road would use it; that it would be worth to the Moffat road alone and above the cost of its use, in round numbers half a million dollars a year; that that figure was based on coal mine development as it stood today, ready for operation, with an approximate tonnage of 10,000 tons per day. That there would be a market for coal in all the states westerly from the Missouri River and northerly to the line of Wyoming; that in his opinion there was ample market for all the coal that Colorado could produce; that Colorado coal could compete and go east as far as the Missouri River and possibly further. That the Dotsero cut-off would give the Moffat Road an outlet to the West; that in his opinion building of the tunnel would not result entirely for the ultimate benefit of the Denver & Rio Grande Railroad but would result in benefit to the territory lying East

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and West of the tunnel which is not now being served with adequate transportation facilities. That even if the Union Pacific should run spurs beyond the present terminus of the Moffat road, it would still be worth while for the Moffat Road to continue into Utah; that the so-called Moffat country could
390 not only use, if fully developed, the spurs from the Union Pacific, but the Denver & Salt Lake as well. That the income would come from agriculture and mining development; that the principal valleys west of Kremmling, Colorado, run east and west; that they contain wonderfully fertile valleys, timber, mineral, agricultural lands, coal and oil shale, capable of development almost beyond conception; that the proposed line from Wamsutter, Wyoming, south would tap the resources of Moffat County at Craig, but that it would not be a water grade, there being a divide between Wamsutter and Craig. That the interest during construction included in the estimate of cost was in round numbers from $700,000 to $800,000, figured at 5 per cent per annum; that the estimate of cost, exclusive of interest during construction, was approximately $6,000,000; that the estimate of cost included the approaches to be made by waste material from tunnel excavation; that it also included railroad track and equip-
406 ment, single track in the tunnel and double track on the approaches. That no power plant was included in the estimate but that the cost of power from existing plants was

included. That he knew of nothing which had been omitted necessary to the completion and operation of the tunnel, its equipment and approaches; that there was no inclusion in his estimate of expenses for the maintenance of the tunnel.

Counsel for defendants objected to ques-
413 tions regarding rights-of-way as a matter not having been gone into in direct examination.

Objection sustained.

(Witness continues.)

That the Canadian Pacific tunnel built by Foley Brothers, and Stewart & Wood, was approximately five miles long and took three years to complete it; that it was a double track, standard guage railroad tunnel.

CROSS EXAMINATION

That the estimate of cost included an es-
419 timate of the cost of the right-of-way of approaches, some acreage of which was in private ownership and some in the United States Government land.

Counsel for defendants objected to question as to whether or not Denver & Salt Lake Railroad had acquired any of the right-of-way.

Objection sustained.

Counsel for defendants objected to question as to whether or not the Tunnel Commission made application for right-of-way to the United States Government.

Objection overruled; exception saved.

(Witness continues.)

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That the purpose of the auxiliary tunnel was to cheapen and facilitate the cost of the
426 main tunnel; that it shortened the time of construction, and aided ventilation.

Counsel for defendants objected to question regarding benefit to land west of Dotsero as having been gone into by other counsel.

Objection sustained, exception saved.

(Witness continues.)

That the Denver & Salt Lake Railroad extended 255 miles westerly from Denver to Craig, Colorado, and that when the tunnel was completely constructed and connected with the Moffat Railroad, Moffat County would be provided with very much improved railroad transportation facilities; that not only was the territory crossed by a railroad benefited by it but also the country adjacent and contributary thereto; that while the saving to the Denver & Rio Grande Railroad would be in the neighborhood of $1,100,000 per annum, by reason of the Dotsero cut-off and Moffat tunnel, from this amount would have to be subtracted the cost of the construction of the cut-off and trackage rights over
439 the Moffat line, making a net saving of approximately $800,000 a year; that if the Denver & Rio Grande Railroad used the tunnel it would be of special benefit to it by making a saving in their operating cost; that the amount saved by any railroad in the use of the tunnel would fluctuate in proportion to the tonnage put through it.

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LOUIS F. BARTELS, called by the defendants, testified in their behalf as follows:

That he is a resident, land owner and tax-
441 payer in Denver; has been engaged in the real estate business since 1886, and is acquainted with the Moffat Tunnel Improvement District and the Moffat Railroad; that he is familiar with the proposed tunnel and its location and that he is familiar with various public improvements that have been made in Denver since he was in business; that he has been a member of the City Council for six years; that the construction of the tunnel would be of benefit to the City and County of Denver. That the appraisal of benefits made by the Commission at 15 per cent was reasonable; that when he first came to Denver there were no railroads and that he was familiar with conditions in Denver prior to the time when the railroads came. That there was progress in Denver by reason of the railroads coming in; that the method of apportionment on the percentage basis, based upon the value of real estate within the District,
452 was in his opinion a fair method of apportioning the benefits.

Counsel for plaintiffs objected to the last above foregoing statement.

Objection overruled.

CROSS EXAMINATION

That without railroad connections the tunnel would be of benefit to the City of Denver because of the fact that water could be

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brought through it; that the City of Denver had made filings on the Fraser River for water and that this water would be of benefit to the City and County of Denver beyond the 15 per cent appraised benefit; that 103,000
454 acre feet of water in the Fraser River had been filed on by the City of Denver. That in his opinion the tunnel would be of benefit to all the territory within the State, as well as the territory outside the State, but that there would be a special benefit accruing to land within the District; that even the lands lying adjacent to and outside the District would be benefited and would be benefited to the extent of the land within the District; that anything that would benefit Denver would benefit the property adjacent to and surrounding; that anything that made Denver grow would make the territory around it grow; that land even 30 or 40 miles from the Moffat road would be benefited, the benefit depending in a great measure on the character of the land; that particularly property would be benefited, such as his home in Denver, by the advantages of an adjacent water supply and increased population; that land which had an ample water right would be
485 benefited by the enhancing of values of land adjacent thereto, and by the increased population; that the fact of competition on coal coming from Routt and Moffat Counties would benefit people of the City of Denver; that even the value of irrigation ditches with-

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in the District would be increased by reason of the increase in value of adjacent lands.

RE-DIRECT EXAMINATION

That the increase in population would make land more valuable and therefore make any water company property which was serv-
487 ing the population more valuable; that an easy means of getting coal into a place where it could be sold would be a benefit.

CROSS EXAMINATION

That in his opinion all property along the railroad is benefited by the railroad and property adjacent thereto, as well as the property
489 around the termini of the railroad; that anything that benefited the City of Denver benefited all property within the City of Denver.

L. F. EPPICH, a witness called by the defendants, testified in their behalf as follows:

That he has lived in Denver since 1879
494 and has been engaged in the real estate business in Denver for 25 years; that he was familiar with the Moffat Tunnel Improvement District and the location of the proposed tunnel, as well as the general course of the Moffat Railroad and the D. & R. G.; that he has observed during his residence and business life in Denver the construction of railroads and other means of transportation, as well as other public improvements; that they were of benefit to the lands surrounding and near the improvements; that in his opinion 15 per cent

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appraisal of benefits made by the Commission upon property within the Moffat Tunnel Improvement District, was a reasonable appraisal; that the ad valorem basis of apportionment of benefits was a fair and equitable method.

CROSS EXAMINATION

That while he was not experienced with the benefit of tunnel construction, he has used other public improvements, such as sewers, paving, and viaducts to compare the estimated benefits; that in his opinion all public improvements were a benefit; that increased
499 transportation facilities increased the value of land; that an increase of population bringing a larger area in touch with the western slope would be a benefit to the land; that the tunnel itself unconnected with any transportation system would be of no benefit.

To the last and foregoing statement counsel for the defendants objected.

Overruled.

That the added transportation resulting in the construction of the tunnel and the Dotsero cut-off would benefit Grand Valley as well as Moffat and Routt Counties, but per-
506 haps not to the same extent; that the land immediately adjacent to a good railroad would be increased in value more than that would be in a distance; that anything that advanced the commercial interests of the City of Denver reflected in the value of real estate.

CROSS EXAMINATION

Lands adjacent to a railroad are lands which that railroad renders it possible to
508 serve with transportation facilities, as they would be served better; certainly, in so far as the transportation system renders it possible to serve those districts, special benefit is conferred on the property in those districts, and as to any two points between which that
510 railroad opens up an avenue of communication—say from Craig, Colorado, to Sterling—I think the entire district would be very largely benefited the whole way, not, however, in the same ratio, but assuming that it
518 is a direct line the same special benefit will be conferred on the lands at Sterling if it is on the same through line.

MR. ELLIOTT HOUSTON, a witness
519 called by the defendants, testified in their behalf as follows:

That he has resided in Colorado since 1897; that since 1912 in Denver, and prior to that in Steamboat Springs; that he was engaged in the loaning and investment business in Steamboat Springs; that he is familiar with property generally in Routt, Moffat and Grand Counties, and is president of the Title Guarantee Company of Denver, and interested incidentally in the real estate business; that he is familiar with the Moffat Railroad, knows its course and is familiar with the Moffat Tunnel Improvement District and the proposed tunnel; that he has observed the

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construction of the Moffat Railroad and believes that the construction of the tunnel would be of special benefit to the entire District; that the appraisal of benefits of 15 per cent on the assessed valuation of the District was a fair and reasonable estimate, and that there was no fairer method of apportionment of benefits than on an ad valorem basis.

CROSS EXAMINATION

524 That with the opening of the Moffat Railroad in Steamboat Springs there was an advance in the value of real estate, and that even prior to that there had been an increase; that the benefit which had accrued at that time had in his opinion been lost since; that if a party owned $100,000 worth of real estate that in his opinion it would increase in value $15,000 by reason of the construction of the tunnel; that the benefit would accrue as soon as the tunnel was assured, but that the estimated benefit was based upon the assumption that the tunnel would be utilized by a railroad; that there would be a benefit on a great deal more territory than that within the District; that the portion of the District within the City and County of Denver would be benefited as greatly as the property anywhere else in the District; that the means afforded by the tunnel in opening up a vast and fertile region tributary to this city, by that transportation facility, means an increase in population to Denver; that a benefit to commercial or industrial life of a city increased the value

of real estate in the city; that the benefit accruing was direct.

C. P. LINK, being called by the defend-
532 ants, testified in their behalf as follows:

That he has been a resident of Denver ten years, and prior to that he had lived in Park County since 1871; that he has been a member of the Colorado Tax Commission since its organization in 1912, and had been an assessor and deputy assessor in Park County many years prior to that; that it is part of his duties to determine the value of real estate and the enhancement of values by reason of various things; that he is familiar with what is known as the Moffat Tunnel Improvement District and proposed tunnel. That he has observed in the course of his official career the construction of railroads and other means of transportation and the benefits resulting to property therefrom, and that in his judgment construction of the Moffat Tunnel would be a benefit to the property within the Moffatt Tunnel Improvement District. That 15 per cent as an appraised benefit to the property based upon the assessed valuation of 1921 was in his opinion a very reasonable amount, and that the ad valorem basis of ap-
538 portioning the benefits was a fair method. That he was familiar with the Moffat Railroad and its termini and with the assessed valuation of lands in Moffat, Routt and Grand Counties, during the years preceding the time that the railroad came into those counties. That the assessed valuation in Grand County

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in 1903 was $194,447; that for 1911 it was $1,133,982; that the real estate assessment in Routt County for 1903 was $1,349,155; that real estate assessment for Routt and Moffat Counties in 1911—Moffat County having been stricken from the old Routt County—was in round numbers $3,340,000; that the railroad was built through that country between those years. That the larger portion of this benefit was not due to government land being taken up. That the construction of the tunnel, because of increased facilities of transporting water, would be of very great benefit to the City and County of Denver. That in considering the benefit to accrue, he had considered first, the fact that the Moffat Railroad would be junked unless the tunnel was constructed; second, the tapping of the great coal fields of
540 Routt and Moffat Counties and their market in Denver and east of Denver; next, the great agricultural interests within the District; next, the benefit accruing from the fact that water could be brought through the tunnel and the general benefits of giving Moffat, Routt and Grand Counties an outlet, and giving Denver a direct outlet west; that it was impossible for anyone to determine with mathematical accuracy the benefits which would accrue, but that he could approximate.

CROSS EXAMINATION

That he is familiar with other benefits accruing to other communities by reason of the
544 construction of railroads, including the Colo-

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rado & Southern to Leadville, the Colorado Midland, the D. & R. G., the Union Pacific, the Burlington, the Atchison, Topeka & Santa Fe, all of which, as a member of the State Tax Commission he had to assess; that upon this experience and observation he was basing his judgment as to the benefits. That he is familiar with the Busk-Ivanhoe tunnel on the Midland road; that it has been abandoned for railroad purposes because the entire western portion of the Colorado Midland was abandoned; that that tunnel was a great benefit to the Colorado Midland road and the reason it was abandoned was due to the fact that it paralleled the D. & R. G. system; that although it was abandoned for railroad purposes, there was some prospect of using it for highway purposes. That the benefit arising from the construction of a railroad depended to some extent on the perpetuity and operation of the road; that the mere fact of the tunnel legislation up to this point has had a very marked effect upon the real estate value within the District· that this benefit was substantial and convertible int· money. That he had known of actual sales in which this benefit was evidenced, as it was his duty to check up transfers in the counties. That he was experienced in the use of water and the
555 handling of water as a ranch man and stock man, and for many years with irrigation; that he had served in official capacities in connection with small towns and the City of Denver in regard to the use of water for do-

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mestic purposes; that he had experience with the gathering of water at an elevation of 9,000 feet. That in South Park, at an altitude of about 10,000 feet, the ditches were reasonably free of snow and ice for six months, and ditches on the Continental Divide for four or five months; that in his opinion the range in the vicinity of James Peak was more accessible and less difficult to gather water to put into a tunnel than the range back of Fairplay in Park County; that there was a greater volume of water in the neighborhood of the Moffat District, gathered in a smaller scope of country; that he had observed the flow in the Grand River just below the Fraser, and back up to the junction of the Fraser, since 1885; that the flow was very great, much greater than at the head of the Blue, and the head of the Platte; that it would be entirely
565 practicable to gather water above an altitude of 9,200 feet for much more than five months and probably twelve months. That he was familiar with the methods of assessment by the Moffat Tunnel Commission within the District and that generally speaking, water rights were included in the land valuation, but sometimes it was not; that from his experience as assessor and member of the Tax Commission, having ridden the range through Moffat and Routt and Grand Counties, it was his opinion that no considerable portion of the increase in land value from 1903 to 1911 came from settlement of government land. That cattle men and sheep men were about

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the only occupants of land in these counties
573 in 1903 and that there was very little cultivated land, and that prior to 1903 the major portion of the irrigated land was farmed for hay and grain; that the irrigated area had increased very slightly.

RE-DIRECT EXAMINATION

That the construction of the Moffat Tunnel would very greatly increase the value of land already irrigated.

WILLIAM G. EVANS, being called by the defendants, testified in their behalf as follows:

That he has lived in Denver, Colorado,
576 for 60 years; that at present he is president of the Evans Investment Company, which deals largely in real estate; that he has been exclusively or incidentally interested in real estate in Denver during the 60 years that he lived there; that the railroad from Cheyenne to Denver was built in 1871; that the Kansas-Pacific followed it into Denver, and the Denver & Rio Grande came later; that he is familiar with the Moffat Railroad and where it extends; that he was an officer of the railroad with Mr. David H. Moffat at the time of its incorporation in 1902, and was connected with it until 1911 or 1912; that for about a year after Mr. Moffat's death in 1912 he was president and acting manager of the road; that he was familiar with the territory embraced in the boundaries of the Moffat Tunnel

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Improvement District and is well acquainted with all of it; that from his experience and observation with reference to railroads, he is of the opinion that the building of the Moffat tunnel will be of especial benefit to the land within the Moffat Tunnel Improvement District, and that the 15 per cent appraisal of benefits accruing by reason of the construction of the tunnel, is a reasonable appraisal of benefits, and that all parts of the District will be specially benefited by the construction of the proposed tunnel; that Denver will be benefited by the proposed improvement be-
585 cause it will bring about a great growth in population and in business, and in the value of its real estate, adding to Denver a very large contributing territory; bringing many visitors and tourists to Denver and through Denver who do not come now; that a large portion of Routt County is underlaid with coal, part of it with oil shale. In the extreme west there are deposits of bitumen; there are cattle ranches; a million acres of land in the hands of the government which will be opened up and made useful; large forests in the eastern and northern portions; that the coal lands are of various grades of bituminous and extend practically all the way to the western line of Colorado; that there are 400,000 acres owned by the State, set aside for the benefit of the public schools, and that all these products will be made more accessible; that prior to the time the Moffat Railroad was built, extensive investigations took place as to the

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best route across the Continental Divide; surveys had been made by the Union Pacific of seven of the passes in the mountains west of
588 Denver; other surveys were carried on by the Burlington in locating a line from Denver to Glenwood Springs; that the route through Gore Canyon was examined by Mr. Moffat and by H. A. Sumner, who had been state engineer and had been engaged in conducting surveys for the Burlington; that the projectors of the Moffat road were satisfied that the best and most available place to cross the range, west from Denver, was a tunnel from the head of South Boulder Creek to come out at the head of Fraser River; that this was determined after making an examination of Berthoud Pass, the Argentine Pass, Jones Pass and Eagle Pass to the north; that this site was practically the best place for it and was approached with easy grades from the east and from the west, and the only place in the range for many miles north and many miles south where it could be done with a tunnel as short as six miles long at an elevation of not more than 9,100 feet. That the original purpose in building the Denver & Salt Lake Railroad over Corona Pass was but
591 for the reason that it would take a number of years to build a tunnel and that it was necessary in order to hold the right-of-way through Gore Canyon and other strategic places, such as Byers Canyon and Fraser Canyon; that, therefore, a temporary line was built over the crest with a 4 per cent grade

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and sharp curvature; that it was never intended to use the road over Corona Pass as a permanent road. That at times the difficulties of operation over the Pass were almost insurmountable, because of snow and the great expense of clearing blockades above the timber line; that the saving to the Moffat road by using the tunnel would be at least 50c a ton; that the principal tonnage of the Moffat road has been coal, with considerable shipments of lumber and large shipments of live stock. In 1917 there were produced in Routt County a million tons of coal, nearly all of it shipped over the Denver & Salt Lake road; that the most accessible point of the Denver & Salt Lake to connect with the Denver & Rio Grande is at State Bridge by means of a cut-off to Dotsero; that this cut-off in the use of the tunnel in connection therewith, would shorten the distance between Denver and Salt
596 Lake and, therefore, between Salt Lake and Chicago 173 miles; take out of the Denver & Rio Grande a 3½ per cent grade and sharp curvatures over Minturn and Tennessee Passes, a serious handicap. It would enable it to compete with the Union Pacific and Santa Fe in carrying all kinds of products, products of the Pacific Islands, China and Japan, silks and spices, fruits, market products of all kinds of which at present the Denver & Rio Grande obtained very little; that the benefit would be very, very great to the Denver & Rio Grande. That the Interstate Commerce Commission two years ago gave

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the average cost of operating a freight train a train mile at $6.00; the average cost of operating a passenger train a train mile, on the Denver & Rio Grande, $2.00, and that assum-
598 ing that the Denver & Rio Grande ran two regular freight trains each way each day for through business between Denver and Dotsero, and two passenger trains for through business each way each day, the Denver & Rio Grande would save a large amount per diem in operating expenses on account of a saving in the mileage of 173 miles. That these gross savings would probably amount to over $2,000,000 per year, out of which they would have to pay interest on the cost of building their road from Dotsero to State Bridge, and such payments as necessary for the use of the tunnel and trackage rights on the Moffat road; that it was probable that the net saving, without estimating any increase in business would be approximately $1,000,000 per year. That in his opinion the Moffat tunnel, when constructed, would be able to sustain itself, paying the interest and sinking funds on the bonds, and the cost of operation of the tunnel; that as chairman of the State Railroad Commission for two years, from 1918 to 1920, he had given special attention to the proposal as well as to the proposal for building two other tunnels, one west of Pueblo, and one connecting the Valley of the Rio Grande to the Valley of San Juan in southwestern Colorado. That in his opinion there was no other place available for the

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tunnel than the site determined; that he had made an estimate of cost of the Moffat tunnel
602 when chairman of the State Railway Commission to be $6,000,000, and that this estimate provided for a tunnel 17 by 24 feet, with a pioneer or auxiliary tunnel 6 by 8 feet; that one-third of it was to be lined. This estimate provided for electric equipment and electric engines, and estimates from the Westinghouse Company had been made and bids offered, which included a power house at both ends of the tunnel. Estimates from tunnel contractors and tunnel builders were to the effect that they could construct the tunnel itself for $4,500,000, and the Commission had an actual bid from a responsible contractor to construct it for $5,500,000, and guarantee of no further cost. These estimates and this bid were based upon war prices and war times, and the estimate of $6,000,000 was in his opinion conservative; that it might be built readily in 3½ years or
606 it might take 4½ years, depending upon the difficulties encountered.

CROSS EXAMINATION

That he was familiar with the Gunnison tunnel; that the estimated cost was $2,500,000, and the actual cost exceeded the estimate greatly.

CROSS EXAMINATION

That of the amount saved to the Moffat Railroad of 50c a ton, part of it would be a

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607 saving to the railroad and part of it would enable the road to pay interest on the cost of the tunnel. That whether or not it would result in a saving to the shipper would depend upon the rates fixed by the Interstate Commerce Commission and the Public Utilities Commission, but it would make it possible for the railroad to greatly reduce its rates. That the railroads could do a greater volume of business at a less expense. That there is no place from the northwestern part of Colorado to the southern boundary where the crest of the range is not persistent so that it could not be crossed, except by a long tunnel; that the range now, from one end to the other, is closed except to wagon traffic, for approximately seven months every year; that the tunnel would aid wagon and automobile traffic as the best approach to its site is along the line of the Moffat road; that the tunnel
615 would not be occupied by railroad trains all the time. That there was no serious difficulty in transporting automobiles, trucks and wagons through the tunnel, either on their own power or by means of electric trains in flat cars; that in his opinion the question of interference from monoxide gas, generated by automobiles traveling through tunnels, had been practically solved. That the proposed consolidation of the Denver & Rio Grande and the Atchison might result in a new situation as regards the use of the tunnel. If permission of the Interstate Commerce Commission to the Denver & Rio Grande to use the

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Moffat tunnel were denied, then the burden of paying for the tunnel by rentals and occupation would be cast upon the Moffat road alone. That in his opinion some benefit would accrue to the City of Denver from the
618 use of the tunnel in other ways, and that unless the tunnel were built the Moffat road could not be kept in operation indefinitely; that it operated at a loss and that its shutting down would be a tremendous damage to all of the Moffat Tunnel Improvement District, both east and west of the range, and that if the tunnel were built, its continued operation would be a tremendous advantage. That he believed that the benefit of the construction of the tunnel would be very broadly spread out, and that there would be a special
622 benefit to Denver and to the northwest, and to the property near the railroad, and that there would particularly be a special benefit to Denver.

F. L. TOBIN, a witness called by the defendants, testified in their behalf, as follows:

That he is a resident of Denver and had spent four years in Routt County in the coal mining business; that at present he is acting
624 as secretary of the Transportation Committee of the State of Colorado; that he is familiar with the Moffat Railroad and the proposed tunnel and the general boundaries of the topography of the Moffat Tunnel Improvement District; that he is familiar generally with the value of coal lands and the coal business in the Moffat Tunnel

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Improvement District. That in his opinion if the tunnel were built, a benefit would accrue to the coal lands and coal business in Routt County; that the benefit to the coal land would be in increase in value accruing by reason of the construction of the Moffat tunnel, and that this was illustrated by a company in which he was interested, leasing coal land for $400 a month before the construction of the tunnel was assured, with the condition that after the tunnel was constructed, they would pay a maximum of $1,000 a month; that without the railroad and transportation, coal land would be practically worthless. That the appraisal of benefits, insofar as they applied to coal land in the District, at 15 per cent was very reasonable.

NO CROSS EXAMINATION

ERSKINE R. MYER, a witness called by
630 the defendants, testified in their behalf, as follows:

That he is a practicing attorney in the City of Denver and at present assistant attorney for the Moffat Tunnel Commission. That he has been acting in that capacity since the latter part of June, 1922; that he is in charge of the apportionment of benefits, appraisal of benefits, under the Commission, and that in arriving at its conclusion the Commission examined a great many witnesses from all parts of the District engaged in various kinds of business—real estate, ranching, coal
633 mining, lumber, banking, stock raising—and

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that they were especially questioned in regard to benefit which would accrue from the construction of the proposed tunnel; that in addition to that, members of the Commission went over the territory of the Western Slope and investigated personally in regard to the benefits which would accrue in that locality; that the members of the Commission who lived in Denver investigated the benefits in Denver, and also obtained the expert testimony of men who had been identified with the real estate business and public improvements in Denver for a great many years. That the range of the percentage of benefits of these witnesses and persons who were examined varied from 15 to 75 per cent, but that no testimony taken indicated a benefit of less than 15 per cent on any kind of real property. That these witnesses were representative men, taken indiscriminately, without any idea as to what their testimony would be. That they were experienced in benefits and values; that none of the plaintiffs or intervenors in this action have filed objections or exceptions to the appraisal of benefits, as provided by the statute, notice of which was given by
636 publication to all land owners within the District.

CROSS EXAMINATION

That the notice of the hearing upon the appraisal of benefits of property with the District was published in one newspaper of general circulation, in two editions, a week apart, in every county within the District, and that

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the legal requirements of the publication were observed and met.

CROSS EXAMINATION

That the description in the notice was suf-
637 ficient to identify the property and to give information to the owner as to whether or not his property was included in the notice.

Counsel for the defendants objected to a question as to in what way the information was given.

Objection sustained.

(Witness continues.)

That the notice was in the form of a legal, public notice, containing the salient parts of certain resolutions passed by the Commission, and that the affidavits of publication in said newspapers were on file in the office of the Commission.

642 Thereupon Mr. Smith, for the intervening plaintiffs, offered as Exhibit "J" a copy of the Colorado Transcript of August 10, 1922.

No objection being raised, it was admitted.

(Witness continues.)

That he did not believe that there was anybody who is a resident of Jefferson County who testified before the Commission, although there were others, who were qualified regarding their knowledge of property values.

Thereupon counsel for the plaintiffs asked to appear in the record that it was admitted by counsel that the City and County of Denver had made surveys and filings with the state engineer in 1921 for waters of the Fra-

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ser River and its tributaries which could be collected above the portal of the proposed Moffat tunnel.

August 31, 1922.
1 P. M.

647 THE COURT: When this case was first brought up, I expected it was for the purpose of getting the record perfected and the issues made up so that the case could be presented to the Supreme Court at an early date, and that it was not intended to be so thoroughly argued as it has been. As long as counsel has taken the pains to thoroughly present the case to this court, I feel that it is my duty to give consideration to that argument and to express my views on the subjects presented, not that the views of this court will make any
648 particular difference with the Supreme Court, but that I feel that litigants and counsel are entitled to the conclusions the court came to after hearing these arguments. The matter has been presented probably as good as possible in cases of this kind. It involves so many questions that it makes it long and tedious, and difficult sometimes to understand, but counsel, in the short time that they have had to prepare this case, have certainly prepared it very well, and have been diligent in presenting it to the court.

I want to say in the outset that the judge of this court himself has within this district considerable property, in fact, all the property
649 that his industry has been able to accumulate, and that his property is located practically in the same place as that of the intervenors

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in the northern part of Jefferson County. I am personally acquainted with practically all of the intervenors. Many of them are my personal and political friends, some of them have been my clients, and the property which I own is similarly situated to the property of the intervenors, perhaps as unfavorably
650 situated to receive benefits from this tunnel district as that of any of the intervenors, according to their theory; that it sets upon the edge of the district and between it and the Moffat road are two intervening railroads. It has no need for increased transportation, no need for increase use of water, as it is located along the Clear Creek Valley, where there is ample water with very old priorities. It is located at the edge of the district; in fact, the line of the district passes through the property, and on one side of this line the property is to be assessed, and the other immediately adjoining is not to be assessed. If I had thought this situation would influence me in any way in considering this case, of course, I would have informed counsel; but
651 I do not consider I would be in any different position than a judge within the City and County of Denver who might own property within that City and might subsequently be called upon to pay taxes. More than that, the character of this litigation is such, and its size is so great and so many important questions are involved that I would feel indeed that I had no ability whatever if I were not able to forget during the hearing of this

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case, my personal situation; and as far as acquaintanceship with any of the intervenors is
652 concerned, it can have no effect upon me, although I realize that these farmers may look upon me, as a judge elected in this district and in their own community, as one to protect them against what they might seem to think is the influence of a very rich section of the country, such as the City of Denver, and as they believe, attempting to put upon them a very great and heavy burden without any benefits to be received. However, I know
653 they would not expect from me any other than an honest opinion upon the questions involved.

The presumption is that the legislature in passing the law acted within the terms of the constitution, and that they did not violate the constitution, and that they had authority to do what they attempted to do. This presumption continues until the person attacking the law has, by some direct and positive argument or proof, overthrown or overcome that presumption. In this case, the burden is upon the plaintiffs to overcome the presumption that this law is valid in all respects. They must overcome that by pointing out that some of the provisions of the constitution
654 are violated, and they must show in a clear, convincing and unquestionable way that the constituion is violated. There can be no assumption by the court that any provision of the constitution is violated. And I think that counsel's statement in the beginning was cor-

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rect, that it is necessary to show more than that some underlying governmental principle, or some spirit of the constitution was interfered with. It must be shown that some definite section or article of the constitution is plainly and clearly violated, otherwise the law necessarily must be sustained.

The first objection made to this bill, ar-
655 gued with any great force, is that the purposes of this tunnel are not public, in the sense that the state government or any of its component parts may carry it on. Like a good many of the other propositions of this case, to define what is a public purpose is difficult. What is public depends upon the age in which we live. It depends upon the people, it depends upon the character of the country, it depends upon the question of location of population, and a great many facts and circumstances. What in one age would
656 be considered a public purpose, in another age would not. What would be considered public in a large city like New York, with a congested population, would not be considered a public matter in a sparsely settled country. And, also, what might be considered, for instance, in a northern country where they have snows and ice, and things of that kind as a public improvement looking towards caring for that situation for the public benefit, would not be considered a public improvement in a country like Florida. So, we have to consider the particular situation with respect to time and place. In ages gone

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by, it was considered quite a public duty to
657 erect churches and things of that kind, and even in ages gone by they say there were 100,000 men employed for twenty years to build a tomb for a king. Those were considered public in those days, but in our day they would not be. So that in determining whether this is a public improvement or not, we have to take into consideration many things.

The Tunnel Bill itself states that this tunnel is a transportation tunnel for the purpose of providing means of communication and transportation between the western slope and the eastern slope of the Great Divide, connecting the two portions of this district. The Bill also provides that the tunnel shall be
658 used for railroad transportation, or transporting automobiles and other vehicles. It may be used for other purposes, such as water purposes, lines of communication and lines for electric power, and all of these uses to which the tunnel may be put have for a good many years in our country been considered public, or quasi-public in character. It is not necessary in order to be a public improvement that it should be governmental or municipal; it may be public without being for the purpose of either state government or municipal government. There is no provision for any profits to be made in the operation of this tunnel,
659 no provision for it to be used in any private enterprise. My definition of a public improvement would be one in which the benefits to be derived from its use are general in char-

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acter to the community which the public improvement serves, as distinguished from the benefits derived from private enterprise, or special benefit derived from an improvement. I cannot see why a tunnel is not properly classified as a public improvement with such things as bridges across rivers, subways, public roads, wharfs, harbors, and many other things of that kind. It is not necessary that it be free; it may be public and still money be charged for its use, which is illustrated in the City of Denver by the Auditorium, and in many outside places where they charge for
660 the use of public ways. That does not make it a private enterprise or take away its public character, the fact that this tunnel may be rented, leased or contracted away. So that from the bill itself, stating the purposes of it, without considering any testimony, it seems to me that it must necessarily be a public purpose.

The other objection made by the plaintiffs to this bill is that the construction of the tunnel and its operation in the manner provided by the act is a delegation of the taxing power of the legislature to other than the municipal bodies or legislative bodies of municipal or quasi-municipal corporations in the
661 state. Counsel has contended that the authority in this case is given to a Board and not to a legislative body of the corporation. The language of the State constitution is—not quoting it, of course, verbatim—that the legislature shall not delegate to any special board

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or private corporation authority to tax. That provision of the constitution was undoubtedly adopted to prevent the legislature from conferring on persons not responsible to the citizens the power and authority to tax, except that statute provides that the right to tax
662 may be conferred upon municipal corporations and similar corporations; that is, authority may be given to the governing body of corporations. Counsel said, and I think correctly, that that indicates that it must be given to the legislative body of the corporation, in the case of towns and cities, the city council. If this was a delegation by the legislature to a commission appointed by the governor for the purpose of constructing a tunnel, of authority to tax, I believe it would be in violation of that section; but in this instance the legislature has created a corporation to which these persons are responsible and which they represent. Counsel has said that the fact that they are appointed by the Governor and not elected by the people indi-
663 cates that they are not the representatives of that corporation. That cannot be true. There is not a county formed in this state in which the first officers are not named by the Governor. The fact that they are appointed by the Governor does not take away their representative capacity, any more than the fact that the Governor appoints a United States senator in case of a vacancy. He represents us just as much as though he were elected, because he is appointed under the authority

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of law; and in this instance, when the Governor appoints these commissioners, his control over them ceases. They are not a part of the executive branch of the government;
664 they are the representatives of the corporation, and as such its managers and its legislative body with authority, because in our country it is a representative government, and the people must speak through their representatives. So that this authority is not delegated to a special body or to a private corporation, but is delegated to a public cor-
665 poration created as one of the agencies of the State Government.

Mr. Smith in his last argument has questioned the authority of the legislature to pass this bill because it violates the constitution prohibiting the passage of special laws in certain instances, and in all instances where a general law will answer the purpose. First, he says that this is a public highway, although he doubts that to some extent, and that it is directly prohibited. My view of it is, that this special law was not a law especially to construct a highway or designate or lay out a highway. This law was a special law to create a corporation public in its character as a part of the state government for the pur-
666 pose of carrying out the duties and purposes of the State government, and that it is not in any way contrary to the provisions of that section of the constitution. Further than that, as counsel has said, the legislature, unless there is special prohibition against it, are

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the judges of whether or not a special law is necessary, and whether or not the same thing may be accomplished by a general law. In this instance, the legislature has determined in their opinion that the situation is such that no general law can be passed that is applicable to it. So, there are two reasons why Mr. Smith's argument in my opinion, is not tenable. The creation of a corporation for special purposes is not prohibited by the consti-
667 tution. All the counties of this State have practically been created by special legislation, the county is specially carved out by an Act of the legislature, because the situation is such that a general law cannot be passed that is applicable to it; and in this instance, aside from what the legislature has determined, it
668 is quite apparent that there is no other situation in the State of Colorado just like this situation, and that a law general in its application could not be passed to cover it.

The other objection is that the Act does not provide for the taking of this property for public purposes by due process of law, that is, it is an arbitrary taking by the legislature without the consent of the persons who live in the district. It is as difficult to define what due process of law is, as to say what a public improvement is, but this much I think is well understood from a legal standpoint, that in order to constitute due process of law, it must be that the citizen's property is taken by the ordinary and well known method, and that he is protected in his possession and

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669 use of his property by the ordinary and well known principles of the laws of our country; and among those things that are fundamental and essential in due process of law is that he shall have, first, a time set down that is reasonable, and a place convenient and a tribunal fair and impartial before which he may present his objections, and have the question of the reasonableness of the taking of his property, or the reasonableness of the construction of the public improvement, or the reasonableness of the assessment to be made against him, determined by the Board or by an impartial tribunal. It is not necessary that it should be a court. It is not necessary
670 that he should have any particular length of time. It is not necessary that he should have the right of appeal. It is only necessary that he should have a reasonable time, a convenient place and an impartial tribunal. It is not necessary in the creation of special improvement districts, as the law now stands, I think, practically throughout the United States, that
671 the consent of those persons to be assessed shall be received before the improvement is constructed. The legislature representing the people has authority, even though it was against the objection of the entire district to order the creation of a district, and to order public improvements. One of the highest and most important duties of any government is that of making public improvements. It is not necessary in this case that they should be given an opportunity even to protest

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against the organization of such a district, or against the making of the public improvement; it is only necessary that before the tax shall be levied for its payment that the person on whom the tax is to fall shall be given an opportunity to say whether or not the improvement is of the character of a special benefit, and whether or not the assessment is
672 fair and equitable and in justice to other parts of the improvement district.

Counsel says that this is not a fair and impartial tribunal because it is the Board which rules the district. But there is no controversy between the taxpayer and the district that they are to determine; the controversy is between the different taxpayers. The assessment must be paid by the taxpayers. It is a question of equalization of these charges and the determination of the benefits as between the taxpayers that the Board passes upon, and not the interest of the taxpayers as antagonistic to the Board or to the
673 corporate entity, consequently they cannot be interested in being unfair or unjust to the taxpayers. I am not saying that Boards might not be arbitrary and unjust and unfair. Many courts are that way and many juries have been that way. We may make a mistake in the selection of our officers, and we may get much the worst of it, but that authority must be lodged in some manner, and com-
674 mon experience teaches us that the great majority of men who hold public office are fair and impartial, or at least try to be, and the

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man who is unjust and unfair, unless he has some particular reason so to be, is the exception rather than the rule. So that in this instance, the only thing that is necessary is to provide for a hearing before the assessment is levied, which is done by that act, requiring the publication of a notice two weeks before the first day of December of each year. That might be too short a time in some instances, but where it is a going concern and is regular in the time which will be given to the consideration of these questions, as in the case of County Commissioners sitting as a Board of Equalization of the State in hearing similar controversies, sitting from day to day over a great period of time, the Court cannot see
675 that that is not a reasonable and sufficient notice to give the taxpayer an opportunity to be heard.

Mr. Smith also raised another question as to the legality of this bill, and it was argued I might say also by Mr. Park, and quite forceably, and that was, that this is not an improvement district in the legal or practical sense of the word; that a public improvement for which special assessments may be levied according to benefit, is one in which the improvement is completely finished, the assessment definitely determined, and assessed, once and for all time. But this bill provides
676 that not only the public improvement may be constructed, but that the district may operate or assess taxes for operation purposes for an indefinite and perhaps perpetual period. I

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think myself that there are two purposes for which this district is created, one of them for the purpose of constructing a public improvement, by the issuance of bonds and the payment of those bonds, and the other the operation of the public improvement after it is constructed. It may be that that portion of the bill providing for the levying of assessments for the purpose of maintaining this tunnel after it is constructed is unconstitutional, for the reason that the maintenance of a tunnel or a public improvement, does not fall within the class of special benefits conferred by a public improvement.

Mr. Montgomery: Your Honor, my interpretation of section 13 is that it limits the assessments to the payment of the interest and principal on bonds.

678 The Court: And operating expenses—maintenance.

Mr. Montgomery: No.

The Court: There is some place in here that it permits the Board to levy for operating expenses.

Mr. Park: Yes.

The Court: Of course, the right to levy taxes or assessments for the purpose of paying the bonds and the interest on bonds is a matter about which there cannot be any question. Now, I am just commenting on this, it does not matter whether you argue with me or not. But, I say it may be unconstitutional on the theory that this is not considered an improvement for which a person receives

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special benefit and ought to be paid by a general tax. But that part of this Act is so separated from the other that it might be held to be unconstitutional and still the purposes
679 of this Act go on, that is, the construction of this tunnel; and I am not prepared to say, and am not going to say at this time, that that portion of the Act is constitutional or unconstitutional, because that is something that is so far in the future that it may never arise, and when it does arise, the plaintiffs in this case, and the intervenors would have the opportunity at that time of having the collection of such an assessment enjoined. There is no doubt but what the legislature may create this corportation for the purposes of maintaining and carrying on the tunnel after it is constructed; I do not mean to say that they cannot do that, but whether they may assess it specially on the real estate is in my mind somewhat doubtful. But that does not interfere with the main purpose of this Act, and that is the construction of the tunnel.

Counsel for the intervenors seem to think that the legislature has no authority to create special corporations. I think that it is one of
681 the developments of modern government that the legislature or the sovereign power in the government may create agencies and give authority to local agencies for carrying on the State government. In many years past, as stated in one of these cases, it was a common thing in order to carry on a public improvement, for the legislature to create a private

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corporation and to give that private corporation special privileges and special franchises. I think the Hudson River in New York was at one time given over to a private corporation for steamboat purposes. The Ohio River also, I believe, was specially given to some private corporations. Special corporations are organized for the purpose of building turn-
682 pikes. Many corporations are organized, private in character, and to which the State government gave aid and assistance. I think it is a higher state of development in government, that we create public corporations which are eventually in control of the persons in that community, but after all, these corporations are a part of the State government.
683 We have but one government in this State, and that is the State government. Local governments are only such as may be created by the State. Our citizens do not have the right to local self-government. Counsel seems to think that it is inherent in our government, the right to local government. That is not the case. All of the local governments within the State of Colorado are but agencies of the State government. Of course, our constitution by the section which was read here, provides that the State shall not levy taxes for county and city purposes, but that shall be left to municipal corporations created by the legislature, and that is the only provision in our constitution that protects local self-government, and even that might be wiped out by the legislature. And what the legis-

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lature may do itself in the way of public im-
684 provements, it certainly follows it may do by the way of corporate agencies. There is no right existing in the citizens of this State, under its constitution for local self-government to vote upon the question of any indebtedness or to be heard upon that question. They are represented by the legislature, which has sovereign and complete control. The State government is not one like the Federal government, made up of many independent sovereign states; there is only one sovereignty here, and that is the State. Unless it is forbidden by the constitution, the State government may do whatever it thinks in its
685 wisdom is for the public welfare. The legislature are representatives, as stated by counsel, with taxing power. It is my opinion that the legislature might have provided for the creation of a public improvement district without giving any local authority whatever, and it might be done by the legislature and the benefits assessed, if there were any, upon
686 the property. Mr. Park in his argument, for some length of time went over this proposition that these taxes are levied not by the taxing power of the State, but by a Board, as I stated a few minutes ago, and he cited some cases, especially one from Iowa, where there was authority given to a library board to levy taxes. That case has no application, the library board was not representative of any corporate entity or agency of the State. He says that the authority should be given to

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this tunnel board to estimate the amount of taxes necessary to be levied, and that they should be levied by the taxing officers of the various counties. But what is there about the taxing officers of the various counties that justifies the statement? They are only taxing
687 authorities in so far as their county is concerned. They have no taxing power outside of that, and to grant to the various counties authority to tax for purposes outside of the county would be a violation of the constitution, which says that the taxing power shall be delegated to the particular municipal corporation to be taxed. It would be a violation of the law to give authority to the county commissioners to levy taxes for district improvement purposes outside the county. It is true that they might act as agencies for carrying out the law, as is done in school districts, where the tax is voted by the people and is levied by the county commissioners, but in making that levy the county commissioners do not act as the taxing power; they
688 are merely an agency of the taxing power, who, in that instance are the people who vote the tax. The taxing power in a district of this kind must necessarily be the managers of the district, and I use the word "the managers" because the act uses it, and the word
689 "managers" includes all of the authority which may be conferred by law upon officers of a corporation. They constitute the executive, administrative and legislative departments of that corporation; they are confined

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in one board. So that objection made by Mr. Park does not appeal to me as of any force.

The next objection which goes to the constitutionality is that this bill is in violation of the constitution prohibiting the lending of the aid of the State or certain municipalities to private enterprises, or the lending or giving of credit to private enterprises, and in this particular instance a railroad enterprise. The bill itself very clearly sets forth its purposes, and these purposes do not include the
690 building or aiding in the building of any railroad. Counsel contends that the situation is so familiar to us all, so well known to us all, that it cannot be mistaken what the purpose of this bill is, and that is to construct a tunnel to enable the Moffat Railroad, which now operates a line in close proximity to the place where the tunnel is to be constructed, to better carry on its business; and while that does not definitely appear from the act itself, they contend that the circumstances surrounding the passage of this bill, and its history, all show that that is the purpose of it, and that consequently it falls within the rule laid down in the Lord case. The Supreme Court in that case did go outside of the provisions of the
691 Act and stated to some extent that while the act itself seemed to avoid the prohibition of the constitution, as a matter of fact they found that it was in aid of a particular railroad. I have carefully considered that question, because it is a serious question in a case
692 of this kind, and it is one in which we are all

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very much interested, because there is no good citizen of the State of Colorado that would want to see the State lend its aid to private enterprise; we would be in constant turmoil and shortly without any government, it would be a very corrupt government at the best. For that reason, I consider it of very great importance.

It is true that as the situation is now, the Moffat railroad is better situated to enjoy the benefits of a tunnel constructed at this point than any other railroad. It is true that the Moffat Railroad, if the tunnel is constructed and it should obtain a favorable contract for the use of the tunnel, might profit by its
693 construction and by its operation. I agree somewhat with counsel for the defendants in their argument, that in order to come within the term "aid," there must be something in the way of a gift, of a special favor, or to lend the credit there must be something in the way of giving to the railroad a special benefit or the use of the public's credit for its private purpose, but the use accorded a railroad of a public improvement for which it pays, cannot be said to be a gift or in aid. It does not mean that it aids the Moffat Railroad in
694 the sense that the constitution means, the fact that this might be used by the Moffat Railroad. If that was the case, every public utility in the City of Denver is being aided by the City of Denver when they permit it to use the streets of the City. The very Union Depot used by all of the railroads, stands

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upon land which the City of Denver vacated, a part of Seventeenth Street, and gave to them practically for railroad purposes; and
695 all the public utilities in the City of Denver use those streets, some of them with some compensation, and some of them without compensation. I guess the telephone company has never paid anything for the privileges it enjoys, some of the other corporations have; but the fact that they can use a public improvement, such as a bridge, as a street, as a viaduct, does not prove or establish that they are aided by public moneys, or by public credit, or the credit of a State or a municipality, or of the city.

696 I can not agree with counsel for the defendants in his argument that the State could create a special corporation that might go on and violate the constitution. The constitution says that the State of Colorado shall not aid private enterprises by money or credit. That prohibition against the State of Colorado must necessarily apply to the agencies which it creates. To say that it could create an agency that could aid any more than the State itself, certainly is an erroneous statement of the law. Whatever provision exists against the State in the way of assessing for benefit of a railroad must necessarily apply to a corporation which it creates. For that reason, I consider that we must apply the
697 same rules to this district which apply to the State or City, and if the assistance falls within the rule laid down in the Lord case, that

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it must apply to this district. I have no quarrel with the decision of the Supreme Court in the Lord case, although I think the City of Denver, had it been more careful in drawing the bill, had authority to have constructed a tunnel such as is contemplated in the present Act, but when it went into partnership with a railroad, and when it granted to that railroad the perpetual and exclusive use of this improvement, it violated the law.

698 I do not give much weight to the fact that this tunnel might be used for carrying electricity or power or water; those are minor matters, although I think the Supreme Court in the Lord case went just a little too far when it said that it was a matter of common knowledge that you could carry power and telephone lines, and so forth, over the Continental Divide, just as easy as you could carry them through the tunnel, because I have stood upon that Continental Divide in such months as January and March. The snow was twenty feet deep, and raging blizzards which froze upon the telephone poles for six or eight inches in diameter, crashing down the

699 telephone poles and lines and things of that kind, and I know that the person that wrote that opinion must not have stood upon Corona Pass during any of the winter months. But the Supreme Court in that Lord case was convinced from the bill itself that the so-called provisions in it about carrying water and carrying power, and so forth, were mere pretexts, and that the primary purpose of the

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tunnel was to carry a railroad. I believe that the Supreme Court was right in that case, and I do not want in any way to be considered as trying to avoid the full effect and force of that case, because I consider it a great protection to our people that this constitutional provision is in the constitution;
700 but I do say that the Lord case did not decide that the City of Denver could not build a tunnel public in its character and which the City of Denver owned and controlled. The Bill creating the Moffat Tunnel District provides that they may contract—counsel has used the word "lease" during all of the argument, of
701 the use of this tunnel, but as I recollect, the word is that they may "contract" for the use of the tunnel by railroads, and as I think, it protects even against the exclusive use, although counsel cited a New York case that holds that they might have given even the exclusive use; but in this case it says that they may contract that use, but as long as there is any capacity for the use of that tunnel for any purpose, they may go on and make further contracts until the tunnel is fully used for all of the purposes that may be thought of.

Also one protection in this bill, and to me it appeals very strongly, as I will shortly
702 state in going over the question of whether there are any benefits derived from this improvement or not, and that is that it provides for transportation of automobiles and vehicles through it, which enables the district,

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if the railroad does not treat the people fairly and perform the services for which it was intended, to carry on their means of transportation, to even permit competition and to give the public the benefit of this public improvement, and not give to a railroad an exclusive monopoly of its use. As I say, I do not consider the question of carrying water, or power, or light through there, of any great im-
703 portance, except it may be considered as a public purpose to some extent, but not in the sense that transportation is a public service. So that the objection to this bill that it aids or assists a railroad, I do not believe is borne out, even though there are many facts and circumstances surrounding its passage that would lead a person to believe that it is for the benefit of a railroad.

704 As I stated, some objection was made to this as being a highway. I do not consider this as a highway, in the sense that a special law is forbidden to be made establishing it, although I stated that I thought that that might be sustained upon another ground, that is, that they created a district for the purpose of carrying on this public improvement, but it is not a public highway in the sense that it is a means of free communication or travel for all persons or all character of vehicles, or any other manner of travel, or in the sense that it is owned by the public. Although it is public in its character, still it is like ditches owned by public corporations, such as water districts. It does not have that element of a

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705 highway which is a dominant estate over all the property through which it passes, and in the sense that it is owned by the district, such district is the proprietor of it. It does not belong to the public, it belongs to the district, and in that sense it is not a public highway, and I do not say that a railroad is a public highway. I think there is much confusion about the definition of a railway. A railway is simply a means of transportation devised within the last one hundred years and put into operation, but it is not a highway, a public highway, it is a means of transportation. It may use a public highway, and in fact, there may be established in this tunnel a highway for the transportation of motor vehicles, and for foot passengers, but still it
706 would not be termed, as a tunnel, a public highway, because of the proprietary interest, as I stated, which the district has in it. The railroad may use it, motor vehicles may use it. As I stated in a concrete way, it is a
707 means of public transportation between two points.

Coming down to the question of benefits, I believe it to be the law that the legislature, acting under its authority, when it determines that a public improvement is necessary, and that there are special benefits accruing from it, that its finding is conclusive unless it is shown, as I think counsel has well stated, that it is unreasonable, unwarranted, wholly inequitable and unjust and contrary to the general principles of our government, unless

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it be shown that no reasonable man or set of reasonable men, could honestly conclude that benefits would accrue from such an improvement. Not only is that the law, but it is based upon common sense. Here is a concern extending over hundreds of thousands of acres, taking in a large portion of the state
708 —in fact, this territory is larger than some states of the United States, this tunnel district is larger. No one man is capable of determining the question of benefit or lack of benefit from a public improvement of this kind. Nor is a court in as advantageous a position as the legislature is, the legislature consisting of men from all portions of the state, from all walks of life, and who are interested in the public welfare and who are interested in benefiting, if they are acting within their honest authority, which we presume they were, the communities which they rep-
709 resent, and they are responsible to those persons whom they represent, and they are in a position to give a better judgment whether or not benefits will accrue by a public improvement than any private individual or any court could do.

However, I am going to go over to some
710 extent, the question of facts in this case, with the idea of giving my views of whether or not this is a public improvement, and I am going to have in mind the situation of myself and my own property in doing so, not but what I say that the legislative finding that this is a public improvement and that it is of

special benefit is controlling on the court in this case. I do not give any particular weight to the testimony of the witnesses, either of the plaintiffs or of the defendants, wherein they attempt to state their opinions as to the benefits or lack of benefits, by reason of this public improvement, for the reason that none of these witnesses had any special training
711 or any experience which would enable them to work upon that question different from the ordinary witness; and the fact is that all of the witnesses who testified gave their opinion from their common experience, an experience which we all have, and which the court takes judicial notice of. None of them, in fact, pretended to have any special knowledge or training in this question, and it is very doubtful if there can be found a man that could say that he was so experienced and so well trained that he could speak more than the ordinary man concerning these questions. So that what opinion I am now giving as to the benefits or lack of benefits, by reason of
712 the construction of this tunnel, I am going to give from what I consider the common experience of all of us. The facts stated by these witnesses, I give due weight to, and intend to give all of the consideration they are entitled to. And I say that the testimony of Mr. Pearson, who is a fair-minded and able man, that I have known for many years, and
713 a responsible citizen located in this district, is to the effect that any man would be foolish who would not say that a benefit would be

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derived from the construction of this tunnel. Also, Mr. Smith testified that the construction of the tunnel and the operation of the Moffat Railroad must necessarily benefit his land, which is located near Utah Junction. They gave it as their opinion, however, that the benefits which they had in mind were those general benefits that would flow to the people, the City of Denver and surrounding territory, and not the benefits that were specially applicable to the lands within this district, and I will mention that a little further on.

A special benefit, in order to justify an assessment for it, must be one which arises
714 from the construction of a public improvement immediately upon its construction, and must be permanent in its effect, and that benefit must be a material benefit to be measured in dollars and cents. It is not a special benefit that there may be anticipated increased population or that the operation of the improvement thereafter may bring increased population and increased values with it. The benefit, as I say, must be immediate and present in order to justify an assessment for it. The testimony of Mr. Evans to the effect that
715 this would increase the population of the City of Denver, perhaps, and that it would bring a lot of tourists here and that the hotel men would prosper because these tourists would stop off and take dinner with them, is certainly not within what we term special benefits. And those benefits must be not only

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what I have mentioned, but they must be
716 something different from the benefits which generally arise to a community from the construction of a public improvement. It is not necessary that the benefit shall fall upon all the land alike, nor is it necessary that you should point out definitely the particular piece of land and the amount of benefit that it receives; it is only necessary, as I view the law, to show that, taking the district as a whole, the lands within it are specially benefited, benefited different from the lands that are not in it. If we grant that the lands generally within this district are specially benefited, then this law is constitutional, even
717 though some portions of that district may not be benefited. Take for instance, Mr. Kettner, who lives over near Broomfield, it may be possible from listening to his testimony, that the special benefits if any, are very small, but that is a matter which the board has authority to adjust and does not go to the question of the constitutionality of the Act, and where circumstances show that generally throughout the district lands are benefited. I do not agree with Mr. Smith or Mr. Stuart that in order to be constitutional or valid, it must be shown that every particular piece of land within the district is benefited. It is not nec-
118 essary to show, as some of the witnesses attempted, that from the construction of this tunnel there is some direct benefit, such as cheaper coal or cheaper water or cheaper light, or cheaper transportation, or that crops

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grow better, or that they get more water. It is not necessary to show any of those things. As one of the witnesses, a farmer, said: My farm won't produce any more, that is, I won't get any more out of it, won't get any more for my wheat, won't get any larger crop,
719 won't get any greater income. That is not a proper criterion. After considering all these things, it must be all brought down to the question of whether or not the value of his property is materially increased by virtue of the improvement, and that that increase, as I stated, was something different from the increase generally. So that the statements by the witnesses about carrying coal and water, and so forth, were mere matters of argument in order to determine or form an opinion as to whether or not these benefits may be reasonably anticipated by this improvement.

I think it is the common experience of mankind that values in real estate increase with the increase of population, and the in-
720 crease of industry, and that values generally follow lines of cheap transportation between points of industry, points of population. Probably the most expensive land in the world is in the City of New York, where at times during the day there are 50,000 people enter and leave one building on business. The value of land is not always dependent upon what it produces, but its value is dependent on the demand that there is for it, and that demand is created by the different uses to which the land may be put. These do not make up all

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of the causes for the increase for the value of
721 property, but they are some of them; but taking it as a general experience, and I do not believe anyone will refute this proposition, the values of land are dependent upon increase in population, industry and uses. A coal bank, where it hasn't any means to be used, is of no value. I may say that I am familiar with the Moffat Road, and all the territory that it serves, for a great many
722 years, familiar with its operations through the receivership in this court, and I have been all over that land long before the Moffat Road was ever constructed, and many years ago I was where the coal banks in Oak Creek now exist and could have obtained that land for a very small sum of money. Since the railroad is in there, its value has increased, because its uses have increased, and there are persons who can use it, and who are willing to pay something for its use; so, whatever increases the uses to which land can be put will increase the population, increase the demand and increase the value of the land. Whatever increases the population will also in-
723 crease the value of lands. It is common knowledge to all of us that for many, many years, almost for a generation after the construction of the Kansas Pacific Railroad, you could buy lands close to that railroad for $1.25 an acre. Not the railroad, but the railroad in combination with other industries and population is what makes the values.

I may now be differing with most of the

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persons who are interested in this tunnel, including primarily Mr. Evans, who for a number of years has promoted this, as I think sincerely and earnestly, for the benefit of the
724 district and of the people of Denver and the State of Colorado. I say I may differ with him in the conclusions I have drawn. Mr. Evans looks at this situation from the standpoint of a railroad man; I am going to look at it from the standpoint of a real estate owner, and I think that my standpoint is the proper one, because we are the persons who are to pay for it. My views are that if this tunnel is constructed for the purpose of enabling a through line to be operated to the Pacific Coast, that instead of being a benefit
725 to this district, it will be a detriment, and that it would be a calamity to the City of Denver. It is my view that the City of Denver has grown to what it is by virtue of the fact that it has not been on a transcontinental railroad line. And I want to say now, that the City of Denver is probably the largest city in the United States, or in the western hemisphere in population that does not have some form of water transportation. In fact, there are few cities in the world of the size of Denver that have not had the benefit of cheap transportation by means of water, and this peculiar and remarkable growth of the City of Denver is not due to accident, it is due to some natural advantage which this city has
726 had, in combination, of course, with the energy of its people. You will look in vain be-

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tween the Rocky Mountains and the Mississippi River for a city or a town upon any transcontinental line that in any way approaches the size of the City of Denver. Transcontinental lines are operated, not for the benefit of the lands interior but for the benefit of the railroad carrying freight and passengers between coast cities, where they have the benefit of the long haul, and it is to their advantage to carry on and maintain a rate for carrying passengers and freight that
727 will benefit its terminals and not benefit the cities and the towns and the people along its line. That was called to my mind by the question asked by Mr. Stuart, and while it was not perhaps definitely brought out, Mr. Stuart attempted to get that answer from Mr. Blauvelt that proves to my mind, or convinced me, that what he had in mind when he asked the question was a correct view of the railroad situation, that prosperity comes
728 to the terminals of the railroad and not to the property along the railroad. The largest and best railroad, perhaps, in the United States going to the Pacific Coast today is the Santa Fe Railroad, and there is not a city or town of importance for close to 2,000 miles along that line across the southern part of the United States—or the southwestern part. Nor is the Santa Fe Railroad interested in promoting cities or towns along its line of railway. The state of Iowa, long settled before this state, rich in every way in agriculture and business enterprise, has three or four

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of the largest railroads crossing it that there are in this couuntry, has not within its confines as large a city as the City of Denver, and I am convinced that if the City of Denver was located as the City of Cheyenne is
729 now, upon a transcontinental line, that it would not be of much more importance than the City of Cheyenne is. For that reason I do not believe a special benefit will come to the City of Denver from a transcontinental line. Mr. Evans in his testimony says that it will enable us to haul silks and spices, etc., from Japan to New York City. Will any reasonable man say that any benefit can arise to the City of Denver from acting as a tube through which this freight may be carried? In theory it may reduce the price of silk stockings in New York, but I think the flap-
730 pers and the State Constabulary in Colorado will have to pay just as much for silk shirts as they ever had to pay; it will not reduce the price of silks in the City of Denver. And the Interstate Commerce Commission has such supreme authority at the present time
730 that where a city is located upon a transcontinental line they can absolutely make or destroy that city, because you give to any man or set of men the control of the commerce of the nation and they may make or destroy that nation, and the Interstate Commerce Commission is interested in promoting the welfare of the railroads and not in building cities. And I need go no further than the Moffat Road to prove what I am saying. For

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many years the Moffat Road has hauled coal from Routt County to the City of Denver, and there transferred the coal to various lines, as testified here by witnesses, leading into Kansas and Nebraska, and certain limited territory. The coal carried to the City of Denver
732 and delivered at the City of Denver and unloaded at the City of Denver, brought 50 cents a ton more to the Moffat Road than the coal delivered to the Burlington Railroad and carried into Nebraska and Kansas. A few weeks ago a hearing on this matter was had, and some adjustment has been made about that, which apparently will correct to some extent the unjust discrimination. But it is a fact that the Interstate Commerce Commission took from the Moffat Road 50 cents a ton of coal freight, and gave it to the other railroads, and if the Moffat Railroad had received a just and fair proportion of the freight rates to which it was entitled, or if it could have ended its transportation at the
733 City of Denver, it would be today a prosperous concern. This may be somewhat of news to you, but it is a fact that on the amount of coal hauled over that railroad, if the rate was increased 50 cents per ton to the Moffat Road, it would save the Moffat Road from bankruptcy and the Interstate Commerce Commission for all these years has given the benefit of these freight rates to other railroads and
734 in that way has practically ruined the Moffat Road; and if a through railroad is provided by this tunnel to the coast from Denver, or

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through Denver, Denver will merely be one of the points along the transcontinental line. Freight rates will be fixed in such a way that competition will enter from both ends of this line into the Denver territory. As Denver is now, it is protected by this great mountain range. We look upon this mountain range as something terrible, a great obstacle in our advancement, but I want to say that one of the greatest blessings in Colorado is this mountain range. If it had no mountain range, it would be a desert, and this mountain range has protected Denver in the position that it occupies, and has prevented it from becoming merely a village along the transcontinental line. Take, for instance, the line if it comes directly from Los Angeles to Denver. There is at present in Los Angeles
735 located one of the largest rubber tire manufacturing concerns in the world. At present that same kind of business is able to be carried on in the little town of Arvada, which is inside of this district, and also in the City of Denver. If this line should go through from the City of Los Angeles, considering the means that they have to manufacture at that point, we cannot locally compete with them,
736 and our industry will perish. That is only one illustration; it applies to thousands of things that are being made in that western state. Some testimony was given here that if this road was opened up from Dotsero to the State Bridge, that the great coal fields of Moffat County and Routt County would have

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an outlet towards the western coast. That is a very great mistaken idea. The largest coal fields in the western country are located
737 in the State of Utah. They furnish coal for all the western coast. They have an ample supply, extending as far as Seattle north, and as far south as San Diego. That coal at the present time cannot enter into competition with the Moffat County coal, in the City of Denver, due to the fact that there is a local freight rate and a difficult road to carry it over. But if this cut-off was made that we are talking about, all of the coal of Utah would immediately enter into competition with the Moffat County coal and the territory which is east of Denver would not be sufficient to make a market for all of it. It would not be a benefit, and as a matter of fact, beyond question, there is no market on the western coast for the Moffat County coal, so that the creation of this district, if I were
738 called upon as a taxpayer in this district to vote upon it, would not be sustained on the ground that it would furnish a means for a transcontinental railroad. But insofar as this district enables the City of Denver to have the benefit of the natural resources of Moffat and Routt Counties, and the territory of Moffat and Routt counties has the benefit of a market in the City of Denver, it is a benefit to each of them, and whenever Denver relinquishes to any other territory this territory of northwest Colorado, it will be a damage and detriment to Denver. In the respect

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which I have mentioned, I differ with Mr. Evans. I say that he speaks from a railroad standpoint, because it would be a good thing for the railroad. If the railroads had their
739 way, they would just have railroads run from coast to coast, and they would not stop for freight along the line, because they make more money in that way, and I say that Den-
740 ver should maintain its independence and the protected condition which it has enjoyed, and if it does it will grow in the future as it has in the past.

I differ from the intervenors, who are my neighbors, as to whether or not there will any benefit accrue in the section of the country in which we live. If the Moffat tunnel is constructed, two things will arise: One of them, a good railroad can be maintained in this territory in northwest Colorado, and while that brings some agricultural products in competition with these intervenors who are engaged in farming, still the competition exists in the City of Denver, and will be of no particular moment, because it is practically a world market. It will make a better railroad through there, it will build up the towns that are already located there, such as
741 Arvada. Not only in time will it build them, but the anticipation of this tunnel will build them, and it will increase the demand for property in that country. If this tunnel is used for transportation by automobiles, it will bring within that territory an improved road and will bring to that road an immense

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number of travelers by automobile, and other vehicles, and as all of us know, as soon as there is a highly improved highway, the land becomes of value for residence purposes, shops, oil stations, etc. It is very easily illustrated by going down the paved highway between here and Denver. Travel on a public highway brings business and that brings a demand for the real estate, and brings an
742 increased value to that property. We are so located that this tunnel cannot be approached either by a railroad or by an automobile road without crossing through the territory in which we live, and in that way we will be specially benefited. We will be benefited in a
743 different way from the City of Denver, but we will be benefited and will be specially benefited because the territory in which we live will enjoy these public improvements and enjoy this increased population and transportation which will bring value to our property. It goes without saying that a means of transportation to the City of Denver will help Moffat County and Routt County, and there will be increased value of the property, increased demand for property, which will increase its value of both agricultural and mineral lands. I think, perhaps, this "Macedonian Cry," as you might call it, from Moffat County of what they are suffering there from the lack of transportation has to some extent brought
744 about the passage of this bill by the legislature, and they cannot help but be benefited. It is true, as counsel says, that if the Dotsero

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cut-off is made, the Grand Valley may get some benefit of it. It is true to some extent, that the country bordering immediately south of this district will get some benefit. Those benefits, however, are a matter of opinion; they cannot be determined definitely nor measured mathematically. It is impossible for me, knowing all the circumstances connected with my own land, to say that there is any difference between the benefit accruing to me by reason of this tunnel on the north line of one piece of land than that accruing on the south line of the other, but it is the only reasonable way a district of this kind can be made.

745 I realize the very great importance that this case is to the people of the City of Denver, with its territory, and to the State of Colorado, and I realize the great responsibility that rests upon all of those who have taken a hand in bringing about the creation of this district; and I realize the seriousness of placing upon our properties a bonded indebtedness for an improvement which is somewhat new in its character, and I have given
746 to it some considerable thought, and I hope that the consideration that I have given to it may in some way help to have the case properly decided by the Supreme Court, justly and fairly to those taxpayers and at the same time for the public welfare of the people living is this district and of this state. While I am not a citizen of the City of Denver, nor are the intervenors, still the prosperity of

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Denver means the prosperity of us. We cannot escape that. To destroy Denver is to destroy ourselves.

747 I have said, perhaps, more than was necessary, perhaps more than you gentlemen enjoyed hearing, but I feel it my duty under the circumstances to express myself, which I have done. I do not believe that the intervenors or the plaintiffs have established that any constitutional provisions have been violated by the legislature in creating this district, consequently the judgment will be for the defendants, with their costs, dismissing the plaintiffs' and intervenors' complaints.

The Court finds that motion for a new trial will be unnecessary in order to have the matter reviewed. Judgment entered dismissing the intervenors' and plaintiffs' complaints.

748 Mr. Park: We desire to save an exception to the ruling of the court and ask thirty days for a bill of exceptions.

Mr. Smith: I join in that exception, if the court please.

Mr. Stuart: In behalf of the intervenors I represent, I join in that exception.

Mr. Smith: I want also to thank the court for the full consideration he has given this matter. As an intervenor, my interest has been at all times to get the facts brought out and into this record, so that the Supreme Court could pass on it fully and fairly and

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squarely. I have had no other purpose, and have none now.

The Court: I do not doubt that, and as far as what Mr. Montgomery said during the proceedings, it was just a matter of somewhat stimulating us by saying something a little sharp, and I think the way he said it, it was not meant in any way to reflect upon your position in this case. You certainly have a perfect right to do what you have done.

749 Thirty days for bill of exceptions.

ASSIGNMENTS OF ERROR FILED ON BEHALF OF PLAINTIFFS IN ERROR

Comes now the Plaintiffs in Error and show the Court that in the record and proceedings herein the District Court committed manifest error in the following particulars, to-wit:

I.

In holding and ruling that the projected Moffat Tunnel would be an improvement for public use.

II.

In holding and ruling that the Legislature had authority under the Constitution to delegate the power of taxation to a board established by the Moffat Tunnel Improvement District Law.

III.

In holding and ruling that the said Act did not violate the uniformity rule of taxation of the Constitution.

IV.

In holding and ruling that the construction of the proposed tunnel as required by the bill and the leasing thereof did not violate the provisions of the Constitution against lending aid to private corporations.

V.

In holding and ruling that the provisions of said bill did not violate the provisions of the Constitution prohibiting the taking of property in aid of private corporations by the leasing of the privileges thereof to such corporations.

VI.

In holding and ruling that the Legislature had plenary power in declaring what property should be subject to taxation for the construction of the said proposed improvement and that the said provisions of the bill complied with the law, notwithstanding large portions of the property subjected to taxes are not benefited at all.

VII.

The Court erred in entering judgment for defendants in that the proposed bill contains no limit of either time nor amount of taxes nor amount of indebtedness to which the taxpayers of said district may be subjected.

VIII.

The Court erred in dismissing said bill and in entering judgment for the defendants in that the said act of the Legislature violated Article XI of the Constitution in that it does not require the question of the bond issue to be submitted to a vote of the district.

IX.

The judgment of the Court in sustaining said act violated the Constitution of Colorado in that it subjects the taxpayers of the district to taxation without their consent.

X.

The judgment and order of the Court is erroneous because it permits the taking of property of taxpayers of said district without due process of law.

XI.

The judgment and order of the Court is errone-

ous because the taxpayers of said district are denied the equal protection of the law.

XII.

That the judgment of said Court is erroneous in that the assessment for benefits made by the said Board is arbitrary, unreasonable and in excess of benefits, if any, which may accrue to the real estate of said district.

XIII.

That said judgment of the Court is erroneous in that the said act is special legislation in violation of the Constitution of this State.

XIV.

The judgment of the Court is erroneous in this, that the City and County of Denver is a municipal corporation established under the 20th Amendment of the State Constitution and is vested with plenary power in the matter of special improvements and the Legislature cannot delegate to any outside board or corporation the power of taxing the City and County of Denver for any municipal improvement.

XV.

The judgment of the Court is erroneous in that the time limited for filing protests in every instance where protests are permitted is unreasonable as to time and practically bars any opportunity to make such protests.

XVI.

The judgment of the Court is contrary to the law and contrary to the express limitations of the Constitution of the State of Colorado.

For all of which reasons, the Plaintiffs in Error pray that the judgment of the Court be set aside and judgment be entered in accordance with the prayer of the complaint, declaring the said so called Moffat Tunnel Improvement District Law to be wholly unconstitutional and void.

EDWIN H. PARK,
Attorney for Plaintiffs in Error.

ASSIGNMENTS OF ERROR

Filed on behalf of The Wolfe Brothers Land Company, et al, Intervenors.

Now comes John Robertson Smith and The Wolfe Brothers Land Company, and joining in an application for a writ of error herein, with all the other plaintiffs in error, but not in any application that such writ should operate as a supersedeas, do hereby show unto this Court, that in the proceedings, record and judgment in this cause, in the Court below, there was and is manifest error, and that the Court below erred in this, to-wit:

I.

In not holding that the Moffat Tunnel Bill is unconstitutional and void, as being in conflict with and violating each and every of the following named sections and articles of the constitution of the State of Colorado:

Section Fourteen (14) of Article Two,
Section Fifteen (15) of Article Two,
Section Twenty-five (25) of Article Two,
Section Twenty-five (25) of Article Five,

Section Thirty-five (35) of Article Five,
Section Three (3) of Article Ten,
Section Seven (7) of Article Ten,
Section Two (2) of Article Ten,
Section Ten (10) of Article Ten,
Section Fourteen (14) of Article Ten,
Section One (1) of Article Eleven,
Section Two (2) of Article Eleven,
Section Four (4) of Article Eleven,
Section Six (6) of Article Eleven,
Section Eight (8) of Article Eleven,
Section Twelve (12) of Article Fifteen,
Section One (1) of Article Twenty.

III.

In not holding that the Bill is in conflict with and violates the Fourteenth Amendment of the Constitution of the United States.

IV.

Because the findings of the Court that no benefits could arise to the land owners of the proposed district, and the finding that the basis of assessment adopted by the Board had no foundation in fact or law, destroyed the legal effect of the Bill as purporting to create an Improvement District and the injunction should have been granted as prayed for.

V.

In not holding that the provisions of Section Nine of the Tunnel Bill, providing for reimbursement of rents paid by original lessees constituted a practical donation of the Tunnel to railroads, and vitiated the entire Bill.

VI.

In holding that the plaintiffs in error must await further and future action by the Moffat Tunnel Commission, before unlawful and careless assessments would be enjoined, and in not granting the relief prayed for.

VII.

These plaintiffs in error expressly adopt and confirm all the assignments of error made by the other plaintiffs in error herein.

WHEREFORE plaintiffs in error pray that the proceedings in judgment of the District Court in this cause may be reviewed and reversed, and the cause remanded for such order as to this Court may seem proper.

THE WOLFE BROTHERS LAND COMPANY,
JOHN ROBERTSON SMITH,
By John R. Smith,
Their Attorney.

ASSIGNMENTS OF ERROR

Filed on behalf of Torrence White, et al, Intervenors.

Come now Torrence White, Sr., John S. Calkins, Laura E. Mingus and others, intervening plaintiffs below, and joining in the petition of the other plaintiffs in error herein for writ of error, but not in any application to have the same operate as a supersedeas, do, as plaintiffs in error, say that in the record

and proceedings in this cause in the District Court and in the rulings of said Court and its judgment and decree by it rendered and entered there is manifest error to the prejudice of these plaintiffs in error in the following paticulars, to-wit:

In each and every of the particulars, in the holdings, rulings and judgment of the District Court assigned as error, and filed herein as such, by the plaintiffs in error, Mary L. Milheim and Frederick A. Metcalf, the original plaintiffs in the District Court, and these intervening plaintiffs therein as plaintiffs in error, do hereby expressly adopt, accept and confirm each and all of said errors so assigned to stand as assigned by them the same as if repeated and set forth at length herein, and as stating in part the assignments of error of these plaintiffs in error as assignments of error numbers I to XVI, inclusive, hereof.

XVII.

The District Court erred in holding and ruling that said Act and the provisions thereof was and is a valid exercise, by the Legislature, of the power of taxation, and does not exceed such power as limited by the Constitution of the State of Colorado.

XVIII.

The District Court erred in holding and ruling that said Act and provisions thereof constitute a valid exercise of the power of taxation by the Legislature and do not violate the provisions of Section 2, of Article X of the Constitution, limiting the power of taxation in the Legislature to taxes for defraying the annual expenses of Government only.

XIX.

The Court erred in holding and ruling that the Legislature had the power to establish, by said Act and the provisions thereof, the said so-called Improvement District and boundary lines thereof, arbitrarily; notwithstanding there was and is no reasonable ground or basis in fact or in law or in equity for the said determination and establishment thereof, and notwithstanding that it cannot be reasonably determined that a special benefit accrues to the lands in said District and not to lands lying outside of and adjacent thereto, or that such benefit accrues to said lands in said District to any greater extent than to lands outside of and adjacent thereto.

XX.

The Court erred in its holding, ruling and judgment that the transportation tunnel provided for by said Act, was and is an improvement of such public and local character as to justify and warrant the taxation of the property designated by said Act, for its construction.

XXI.

The Court erred in its holding, ruling and judgment that the said Act and provisions thereof do not take, or permit the taking of, the property of the taxpayers of said District for private use without their consent in violation of Section 14, Article II of the Constitution.

XXII.

The Court erred in its holding, ruling and judgment that the said Act and provisions thereof do not take or damage, or permit the taking or damaging

of, the property of the taxpayers of said District for public or private use without just compensation, in violation of Section 15, Article II of the Constitution.

XXIII.

The Court erred in its holding, ruling and judgment that said Act and the provisions thereof do not constitute a local or special law in its nature and having the purpose of licensing a ferry or toll-bridge, in violation of Section 25, of Article V of the Constitution.

XXIV.

The Court erred in its holding, ruling and judgment that said Act and the provisions thereof do not constitute a local or special law laying out, opening or working a road or highway, in violation of Section 25, of Article V of the Constitution.

XXV.

The Court erred in its holding, ruling and judgment that the said Act and its provisions do not constitute a local or special law granting or authorizing, or providing for, the granting to a corporation, association or individual, a special or exclusive privilege or franchise, in violation of Section 25 of Article V of the Constitution.

XXVI.

The Court erred in its holding, ruling and judgment that the said Act and provisions thereof will not lend or pledge the credit or faith of the State, or any part thereof, either directly or indirectly, in any manner, to or in aid of any person or corpora-

tion, public or private, in violation of Section 1 of Article XI of the Constitution.

XXVII.

The Court erred in its holding, ruling and judgment that the said Act and provisions thereof do not constitute any donation or grant or will not be or permit any donation or grant by the State, or any part thereof, to or in aid of any person or corporation, public or private, in violation of Section 2 of Article XI of the Constitution.

XXVIII.

The Court erred in its holding, ruling and judgment that neither the State nor any part thereof becomes, or will become, by virtue of said act and provisions thereof, a joint owner of property with any person or corporation, public or private, in violation of Section 2 of Article XI of the Constitution.

XXIX.

The Court erred in its holding, ruling and judgment that the said Act and provisions thereof do not contravene the provisions of Sections 3, 4 and 5, of Article XI of the Constitution limiting and restricting the power of the State to contract any debt, in any form, except for the purposes and to the extent and in the manner in said sections set forth.

XXX.

The Court erred in its holding, ruling and judgment that the said Act and provisions thereof do not deprive the plaintiffs in error and others similarly situated of their property, or permit the taking of their property without due process of law, in vio-

lation of the provisions of Section 1 of Article XIV of Amendments to the Constitution of the United States.

XXXI.

The Court erred in its holding, ruling and judgment that the said Act and provisions thereof do not deny, or constitute a denial, to the plaintiffs in error and other taxpayers similarly situated in the State of Colorado the equal protection of the laws, in violation of the provisions of Section 1 of Article XIV of Amendments to the Constitution of the United States.

XXXII.

That the judgment of the District Court is contrary to the evidence.

XXXIII.

That the judgment of the District Court is contrary to the law.

WHEREFORE, these plaintiffs in error pray that the proceedings and judgment of the District Court be reviewed; that said judgment be reversed, and that judgment be entered according to the prayer of the complaint, declaring the said so-called Moffat Tunnel Law to be wholly unconstitutional and void.

BARNWELL S. STUART,
Attorney for Torrence White, Sr., et al.
Plaintiffs in Error.

179 In connection with the original record there was also filed in this court the following original exhibits, namely:

Intervening plaintiffs' Exhibit "A," being a large map of the State of Colorado about six by nine feet;

Intervening plaintiffs' Exhibit "B," being a copy of Senate Journal of the Twenty-third General Assembly of the State of Colorado, extraordinary session;

Intervening plaintiffs' Exhibit "C" being a copy of House Journal of the Twenty-third General Assembly of the State of Colorado, extraordinary session;

Intervening plaintiffs' Exhibit "D," being statistics taken from the record of the State Immigration Commission and from the United States Census of 1920;

Intervening plaintiffs' Exhibit "E," being a map of the State Highways of Colorado;

Intervening plaintiffs' Exhibit "F," being a map of the State of Colorado prepared by the Department of the Interior showing contour and character of the country.

Two topography maps, one the Colorado Central City Quadrangle, the other Colorado Black Hawk quadrangle, being marked Exhibits "G" and "H" respectively.

Defendants' Exhibit "I," being a map showing location of land in Routt and Moffat Counties held by the State of Colorado.

All the foregoing original Exhibits are certified and accompany this transcript pursuant to order of Court that said original Exhibits shall accompany and be part hereof.

180 And afterwards, and on the 28th day of September, A. D. 1922, an order of court was entered in the above entitled matter, of which the following is a true copy:

10477.

MARY L. MILHEIM et al., Plaintiffs, and The Wolfe Brothers' Land Company et al., Intervenors, Plaintiffs in Error,

vs.

THE MOFFAT TUNNEL IMPROVEMENT DISTRICT et al., Defendants in Error.

Error to the District Court of Jefferson County.

Said intervenors are this day ordered by the court to file their printed briefs herein on or before October 15th, next; defendants in error and allowed five days after service of copies of such brief in which to answer the same; and five days after service of copies of such answer brief are allowed said intervenors in which to reply thereto.

181 And afterwards, and on October 20, A. D. 1922, the following proceedings were had in said court in the above entitled matter, to-wit:

10477.

MARY L. MILHEIM et al., Plaintiffs in Error,

vs.

THE MOFFAT TUNNEL IMPROVEMENT DISTRICT et al., Defendants in Error.

Error to the District Court of Jefferson County.

At this day come plaintiffs in error, by Edwin H. Park, Esquire, John R. Smith, Esquire, and Barnwell S. Stuart, Esquire, their attorneys, also come defendants in error, by Norton Montgomery, Esquire, their attorney, and this cause is argued orally by counsel and submitted to the consideration and judgment of the court.

182 And afterwards and on November 22nd, 1922, and on December 18th, 1922, said court announced its opinions in this cause, of which opinions printed copies are hereto attached are true copies thereof.